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No. _____

In The
Supreme Court of the United States

ANTHONY RICCARDO,

Petitioner,

v.

LARRY RAUSCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Farmer v. Brennan*, 511 U.S. 825 (1994), does a prison guard have knowledge sufficient to show deliberate indifference when a prisoner complains that his life is in danger from being in a cell with another inmate, or as the Seventh Circuit ruled is this insufficient especially in the absence of statistical evidence proving the reliability of prisoners' complaints?

2. Under *Farmer v. Brennan*, when is it appropriate for a court of appeals to overturn a jury's verdict that an officer was subjectively deliberately indifferent in failing to respond adequately to a serious threat to an inmate's safety?

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The opinion of the court of appeals reversing the judgment of the district court and the jury's verdict in favor of Petitioner is reported at 375 F.3d 521 (7th Cir. 2004) and is reprinted in the Appendix at pp. 1-29. The denial of *en banc* review and the dissents of four judges from this denial are found at Appendix pp. 22-29. The order and opinion of the district court upholding the jury's verdict and rejecting the defense motion for a judgment as a matter of law is unpublished and is reprinted in the Appendix at pp. 30-52. The judgment of the district court is found at Appendix p. 53. The opinion of the district court denying the defense motion to dismiss is unpublished and is reprinted in the Appendix at pp. 54-61.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its revised opinion and denied *en banc* review on July 12, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." United States Constitution, Amendment VIII.

STATEMENT OF THE CASE

Plaintiff Anthony Riccardo filed this lawsuit, in the United States District Court for the Southern District of Illinois, pursuant to 42 U.S.C. §1983, to recover for injuries he suffered from a physical and sexual assault by another inmate when he was a prisoner at Centralia Correctional Center. Riccardo sued Lt. Larry Rausch and alleged that Rausch had been deliberately indifferent to Riccardo's safety in violation of the Eighth Amendment to the Constitution and that this deliberate indifference caused the injuries Riccardo suffered. Ricardo alleged that Rausch ignored Riccardo's request to not be placed in a cell with Juan Garcia. Riccardo told Rausch that his life would be in danger if he were placed in a cell with Garcia, a member of a gang that had a "hit" on Riccardo.

Riccardo was sexually assaulted by Garcia, being forced to perform oral sex on Garcia. Additionally, Garcia physically abused Riccardo, including shaving Riccardo's head, and extorted money from Riccardo. Riccardo suffered very serious emotional and psychological injuries as a result.

Riccardo filed a grievance in the Illinois Department of Corrections on February 11, 1998. He filed an appeal to the Administrative Review Board on March 5, 1998. No response was received. Riccardo was paroled on March 5, 1998 and subsequently filed this lawsuit.

The District Court denied the defendant's motion to dismiss the plaintiff's complaint for the failure to exhaust administrative remedies pursuant to 42 U.S.C. §1997e. The District Court concluded that the grievance filed by Riccardo was sufficient to meet the exhaustion requirement.

A trial was then held and a jury found that Rausch had been deliberately indifferent to Riccardo's safety and that this caused Riccardo to suffer serious harm. The jury awarded Riccardo $1.5 million in damages.

The defendant filed a post-trial motion for a judgment as a matter of law and/or for a new trial pursuant to Federal Rules of Civil Procedure 50(b) and 59. Defendant Rausch argued that the evidence failed to show deliberate indifference on his part; that his actions were not the proximate cause of Riccardo's injuries; that he was entitled to qualified immunity; and that the damages award was grossly excessive. The District Court considered and expressly rejected each of these arguments and denied the defendant's motions. (App. at 30). The District Court then entered judgment for the plaintiff. (App. at 53).

Rausch then appealed to the United States Court of Appeals for the Seventh Circuit. On February 27, 2004, the United States Court of Appeals, in a 2-1 decision, affirmed the District Court's conclusion that there was adequate exhaustion of administrative remedies, but reversed the District Court's judgment. The court concluded that no reasonable jury could find "deliberate indifference" based on the record. Riccardo then petitioned for *en banc* review. On July 12, 2004, the United States Court of Appeals for the Seventh Circuit issued a revised opinion and denied *en banc* review. (App. at 1). Four judges dissented from the denial of *en banc* review. (App. at 22).

STATEMENT OF THE FACTS

In 1996, Anthony Riccardo was convicted of aggravated assault for stalking a former girl friend, and was sentenced to 39 months imprisonment, with credit for 152 days. Tr. I, at p. 58. While being held in Cook County jail, Riccardo was anally raped by his cellmate. Tr. I, at pp. 60-61. Upon his arrival at Centralia Correctional Center in November 1996, Riccardo voiced concerns about his safety and told a prison psychologist that he planned to seek protective custody. Tr. I, at p. 61. The prison psychologist did an evaluation and found that Riccardo's initial adjustment to his new environment was "slightly difficult." (Plaintiff's Exhibit 22 (12/2/96 Mental Health Evaluation)).

In April 1997, Riccardo was placed in disciplinary segregation for placing a towel over a bathroom window to prevent a female guard from being able to see him while he was using the bathroom. Tr. I, pp. 62-63. On May 21, 1997, Riccardo completed his disciplinary segregation and was sent to a cell in the receiving unit to await placement back in the general prison population. Tr. I, p. 63. While in the receiving unit, Riccardo's personal property was taken, presumably by his cellmate, who was a member of the Latin King gang. Tr. I, pp. 65-66. Riccardo objected to a guard that his property had been taken; this conversation was observed by other inmates. Tr. I, pp. 67-68. Riccardo then feared retaliation from members of the Latin King gang and Riccardo refused to return to his cell. Tr. I, pp. 67-68. Consistent with prison policy, Riccardo's request to not be housed with a purported enemy was honored and Riccardo was returned to segregation for refusing housing. Tr. I, pp. 25, 29, and 68. In accord with prison procedures, Riccardo was placed in "pre-disciplinary detention," so

that the prison could confirm whether there was a basis for Riccardo's concern about being housed with an enemy. Tr. I, pp. 67-68. On May 22, 1997, apparently because of a housing crunch in segregation, Riccardo was moved to a cell in an adjacent receiving building. Tr. III, pp. 74-77.

On May 28, 1997, Riccardo had a conversation with Juan Garcia. Garcia, a member of the Latin King gang, told Riccardo that he could help Riccardo get his property back from the gang members who had taken it. Tr. I, p. 70. Riccardo "didn't feel comfortable" after speaking with Garcia and Riccardo immediately spoke with Lt. Alemond, who as the first shift segregation lieutenant was responsible for housing during his shift. Tr. I, pp. 72-73. Riccardo explained to Lt. Alemond that Riccardo did not want to be housed with Garcia and that Riccardo feared for his life if placed in a cell with Garcia. Tr. I, pp. 72-73. Lt. Alemond said that he would "take care of it." Tr. I, p. 73.

At about 9:25 p.m. that night, Lt. Rausch, the second shift segregation lieutenant, brought Garcia to Riccardo's cell to be Riccardo's new cellmate. Tr. I, pp. 73-74. Riccardo panicked; he eventually got Rausch to go with him to a nearby day room and explained that he "fear[ed] for his life" because the Latin Kings had a "hit" on him; that Garcia was a Latin King; and that Lt. Alemond had agreed earlier in the day that Riccardo would not be celled with Garcia. Tr. I, pp. 74-75. Rausch replied that Riccardo had no right to refuse housing while in segregation and that there was no room to move him anywhere else. Tr. II, pp. 30-31.

Rausch then brought Riccardo and Garcia together and asked each, in turn, in front of the other, whether either had a problem with the other. Tr. I, p. 75. Garcia

stated that he did not have a problem with Riccardo; Riccardo, feeling like he was "on the hot seat," shook his head in the negative. Tr. I, p. 75. Riccardo testified at trial that Rausch had told him that he could not refuse housing, that there was no space to move him. Tr. II, pp. 30-31. Riccardo was already housed in the receiving unit as opposed to the segregation unit, something that occurs only when the segregation unit is already full. Tr. I at 24. Riccardo said that in light of this, he saw no point in objecting and since Garcia was much bigger than him, he did not want to complain and exacerbate the situation. Tr. I, p. 76. Rausch then placed Riccardo and Garcia in the same cell. Tr. I, p. 75.

Prison policy required that Rausch evaluate the suitability of housing the inmates together because the Placement Office was closed. Tr. I, p. 36. At trial, Lt. Rausch acknowledged that prison policy is that a prisoner in segregation is not placed in a cell with another inmate if the prisoner states that he does not want to be housed with that inmate. Tr. III, pp. 69-70. Rausch also testified that his usual practice would be to speak to the inmates separately, to determine if there was a problem, when one inmate indicated that he feared for his life. Tr. III, pp. 79-80. Rausch said that he had no recollection of the events which gave rise to this lawsuit.

The morning after Riccardo and Garcia were placed in the same cell, Riccardo filed two grievances, one regarding his stolen property and the other concerning health care. Tr. I, p. 70. Riccardo hoped that a psychologist or psychiatrist would ask to speak with him about the grievances, giving Riccardo the chance to speak away from Garcia. Tr. I, pp. 79-80. Later in the day, motivated by Garcia's promise to get the "hit" off of him and to gain the return of

some of his stolen property, Riccardo agreed to send money to Garcia's parents with instructions that the money be sent back to Garcia in prison. Tr. I, p. 77. Riccardo hoped that this action, designed to evade the prison rule against prisoners exchanging money, would attract the attention of the prison officials and give him a chance to complain about being housed with Garcia. Tr. I, pp. 77-80. Eventually, the money transfer did attract the attention of prison officials, but not until after Riccardo had been attacked by Garcia.

The next afternoon, May 30, Garcia told Riccardo that Riccardo needed a haircut and that Garcia would provide it. Tr. I, p. 80. Riccardo allowed Garcia to do this and it was poorly done, with Riccardo being nicked many times by the razor. Tr. I, p. 80. While Garcia was shaving Riccardo's head, Correctional Officer Watson came by and Garcia asked Riccardo to finish his own haircut. Tr. I, p. 81; Tr. III, p. 48. Officer Watson, seeing the bloody nicks on Riccardo's head, suggested that Riccardo go to the health care unit; Garcia, though, interrupted and said that Riccardo did not need to leave. Tr. I, p. 82. Riccardo mouthed, "Help me," to Watson, but Watson apparently did not see this. Tr. I, p. 82. After Watson left, Garcia slapped and punched Riccardo in the head. Tr. I, p. 82. Riccardo testified that he felt trapped and scared and he did not know what to do to extricate himself from the situation. Tr. II, pp. 36-37.

On the night of May 30, Garcia told Riccardo that he wanted to have anal sex with him. Tr. I, pp. 83-84. Riccardo refused and Garcia ejaculated on Riccardo's feet. Tr. I, pp. 83-84. Later that night, Garcia forced Riccardo to perform oral sex for approximately 15 minutes. Tr. I., p. 84; Tr. III, p. 43. Correctional Officer Watson came to their

cell to ask if they wanted some ice and, at that instant, Riccardo exited the cell, crouched in a nearby corner in a fetal position, and began crying. Tr. I, p. 84; Tr. III, pp. 43-44. Riccardo told Watson that Garcia had forced him to shave his head, beat him, and forced him to perform oral sex. Tr. III, pp. 43-44. Watson moved Riccardo to the Health Care Unit and told other prison officials. Tr. III, pp. 43-44.

Medical Progress Notes for May 30, 1997, indicate that Riccardo reported that Garcia had slapped and punched him, and that Garcia had forced him to have his head shaved and to perform oral sex. Plaintiff's Exhibit 23. An Illinois Department of Corrections Internal Affairs Investigation Report indicates that Garcia subsequently admitted to shaving Riccardo's head. Plaintiff's Exhibit 11. The investigation also found that plaintiff had been intimidated by Garcia into transferring funds, against prison regulations. Plaintiff's Exhibit 11. The report concluded: "Based on incident reports, voluntary statements, physical injuries, and polygraph exam results, Internal Affairs substantiates that Inmate Riccardo K50995 was intimidated into performing oral sex on Inmate Garcia N34024 on May 30, 1977." Plaintiff's Exhibit 11.

The nurse who initially saw Riccardo testified that he was severely distressed. Tr. I, p. 54. Riccardo was placed on a suicide watch from May 30 until June 2, when he was discharged from the Health Care Unit. Plaintiff's Exhibits 19-21. Health care officials noted possible Post Traumatic Stress Disorder (PTSD) based on Riccardo's feelings of stress and vulnerability, difficulties in sleeping, and flash backs.

Riccardo was transferred to Sheridan Correctional Center, where it was determined that he was not to be celled with another inmate. Plaintiff's Exhibit 23. Medical Progress Notes through June 18, 2000, reflect persistent complaints by Riccardo about anxiety and difficulty in sleeping. Plaintiff's Exhibit 23.

Several evaluations were done of Riccardo's mental condition, including by psychologist Sherry Kalicek who concluded that Riccardo suffered from Post Traumatic Stress Disorder. Plaintiff's Exhibit 22. Dr. Tony Fletcher, a neuropsychologist testified that Riccardo suffered from Post Traumatic Stress Disorder. Fletcher testified that after meeting with Riccardo for several hours, reviewing medical records, and conducting a battery of tests, he was convinced, to a reasonable degree of medical certainty, that Riccardo suffered from Post Traumatic Stress Disorder. Tr., pp. 54-55, 79-80, 83, and 109. Dr. Fletcher said that there was no evidence that Riccardo was exaggerating his psychological difficulties or malingering. Tr. II, pp. 73 and 80-82. Dr. Fletcher testified that Garcia's sexual assault, being the second such assault suffered by Riccardo, was the "straw that broke the camel's back." Tr. II, p. 100. Dr. Fletcher said that Post Traumatic Stress Disorder can continue for many years, with some continuing to exhibit symptoms for over 15 years, but that the condition can improve and remit. Tr. II, p. 104.

The jury returned a verdict in favor of Riccardo and awarded $1.5 million in damages. The district court denied Rausch's motion for a judgment as a matter of law and entered a judgment for Riccardo.

SUMMARY OF ARGUMENT

The Court of Appeals overturned the jury's verdict finding that Rausch's deliberate indifference was responsible for the sexual assault to Riccardo. The Seventh Circuit concluded that Riccardo informing Rausch of the threat was not sufficient. The court stressed that Riccardo had not presented statistical evidence showing that sexual assault is a significant problem in the prison where Riccardo was incarcerated or that prisoner's complaints of danger are usually accurate. (App. at 10). The court also emphasized that Riccardo complained to Rausch that his life would be in danger, not that he feared a sexual assault. (App. at 8).

This approach to defining "deliberate indifference" is in conflict with decisions of this Court and of many other Courts of Appeals. In a dissent from the denial of *en banc* review, Judge Ripple, joined by three other judges, made exactly this point:

> "Today, the court allows to stand the decision of a panel majority that imposes on prison inmates a new and impossibly high standard of proof for establishing deliberate indifference in prison condition cases. The panel majority strongly suggests that, in order to show deliberate indifference, a prisoner must not only identify with particularity the harm he fears but also bolster his own account with a special showing containing material such as statistical evidence of a 'strong correlation between prisoners' professions and actual violence.' Neither of these requirements find support in circuit or Supreme Court precedent. Consequently, the panel majority's imposition of these requirements not only does

> violence to our Eighth Amendment jurisprudence, but it also effectively amends, without any legislative mandate, the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 for cases brought by prisoners." App. at 22.

Judge Ripple's dissent from the denial of *en banc* review clearly sets forth why Supreme Court review in this case is necessary. Under this Court's decision in *Farmer v. Brennan,* 511 U.S. 825 (1994), a prisoner must demonstrate "deliberate indifference" in order to recover for injuries suffered while in prison. The prisoner must demonstrate both *objectively* that there was a serious risk of harm and *subjectively* that the officer knew and acted in disregard of this risk.

As this case illustrates, there is substantial uncertainty and a split among the Circuits concerning the legal standards to be applied in implementing this test. In the decade since *Farmer v. Brennan*, the Supreme Court has not returned to the issue and a divergent approach has developed among the lower courts. First, there is uncertainty and a split among the circuits as to what evidence is sufficient to show that an officer knew of a serious risk. For example, the Seventh Circuit expressly held that a complaint by a prisoner to a guard is not enough to constitute knowledge sufficient for a finding of deliberate indifference. *See* App. at 10 ("a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk"). But other Circuits, in identical situations, have held that a prisoner's complaint to a prison guard of a threat to his or her life is sufficient to give the officer knowledge and to create a duty to act. *See, e.g., Flint v. Kentucky Dep't of Corrections,* 270 F.3d 340 (6th Cir. 2001).

In concluding that there was not objective evidence of deliberate indifference, the Seventh Circuit stressed the lack of statistical evidence concerning sexual assaults at the Centralia Prison and the reliability of prisoner complaints. App. at 10. But as Judge Ripple pointed out in his dissent from the denial of *en banc* review, no other Circuit ever has indicated that such evidence is needed and this creates an evidentiary burden that no prisoner could meet. The Seventh Circuit also emphasized that Riccardo complained of his life being in danger, not sexual assault, the injury he suffered. App. at 8. But several other Circuits have come to an opposite conclusion and said that a prisoner need not complain of the specific harm suffered. *See, e.g., Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002); *Curry v. Scott*, 249 F.3d 493, 507 (6th Cir. 2001); *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998).

Second, there is substantial uncertainty and a split among the Circuits in applying the second prong of the *Farmer v. Brennan* test, specifically as to the appropriate role for the judge, and especially an appellate court, in reviewing a jury's finding of deliberate indifference. In *Farmer v. Brennan,* this Court stated that the determination of whether an officer is subjectively deliberately indifferent is inherently a factual question for the jury. 511 U.S. at 842.

In this case, the Seventh Circuit gave little weight to the jury's verdict finding deliberate indifference or the trial court's upholding that verdict in denying the defendant's motion for a judgment as a matter of law. The Seventh Circuit evaluated and weighed the evidence on its own in concluding that no reasonable jury could find deliberate indifference. This approach, however, conflicts

with that of many other Circuits which have expressly held that evidence like that presented in this case is sufficient to create a triable issue of fact which should be resolved by the jury. *See, e.g., Curry v. Scott,* 249 F.3d 493, 508 (6th Cir. 2001); *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999); *Hayes v. New York City Department of Corrections,* 84 F.3d 614, 621 (2d Cir. 1996).

The Seventh Circuit's decision in this case raises profoundly important questions of constitutional law affecting prisoners throughout the country. This Court should grant review to clarify the law concerning what evidence is sufficient to establish deliberate indifference and what is the appropriate role for an appellate court reviewing a jury's conclusion of deliberate indifference.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHAT EVIDENCE A PRISONER MUST PRESENT TO DEMONSTRATE THAT A PRISON GUARD HAD SUFFICIENT KNOWLEDGE TO BE "DELIBERATELY INDIFFERENT" TO THE RISK OF VIOLENCE

In *Farmer v. Brennan,* 511 U.S. 825 (1994), this Court held that a prisoner's Eighth Amendment right to be free from cruel and unusual punishment is violated when a prisoner is sexually assaulted by another inmate and prison officials are "deliberately indifferent" to the prisoner's safety. The Court observed: "Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no

legitimate penological objectiv[e], any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 833.

A prison official is "deliberately indifferent," if the official knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Id.* at 847. In other words, the prisoner must satisfy both the objective (substantial risk of serious harm) and the subjective (knowing disregard) components of the test. *Id.* at 834. There is a conflict among the Circuits and uncertainty as to what is sufficient to meet both of these requirements under *Farmer v. Brennan*.

As Judge Williams noted in her dissent to the denial of *en banc* review: "With regard to the Eighth Amendment inquiry, the majority opinion highlights a major gap in the caselaw. Particularly, what is required to prove the objective prong of the deliberate indifference standard?" App. at 27.

The jury in this case found that Rausch's conduct was deliberately indifferent to Riccardo's safety and that this caused Riccardo's injuries. The district court after reviewing all the evidence came to the same conclusion and found that the objective requirement for deliberate indifference was met: "[T]aking the totality of the circumstances and information conveyed to Rausch, this Court finds, from an objective perspective, at the time Rausch made the decision to cell Garcia with plaintiff, there was a substantial risk of harm to plaintiff. The scenario defendant Rausch faced has 'DANGER – PROCEED WITH CAUTION' written all over it." App. at 45.

But the Seventh Circuit, in overturning the jury's finding of deliberate indifference, pointed to three major deficiencies in the evidence to meet this requirement. Each conflicts with the holdings of other Circuits in terms of what is required to show deliberate indifference.

First, the Seventh Circuit held that a complaint by a prisoner to a guard is not enough to constitute knowledge sufficient for a finding of deliberate indifference. The Court stated that "a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk." App. at 10. The court said that the Rausch was not deliberately indifferent because Garcia was himself in segregation from the Latin Kings and that Garcia had not been disciplined for acts of violence in prison. App. at 9. The Seventh Circuit gave little or no weight to the factors that a reasonable jury could use to find the failure to respond to the complaint constituted deliberate indifference here. Riccardo was in segregation precisely because he had previously complained that the Latin Kings had a hit on him. Tr. I, pp. 25, 29, and 68. As Rausch admitted at trial, Illinois prison policy requires that inmates not be housed together, when one complains that the other is a threat to his or her safety. Tr. III, pp. 69-70, 79-80. Rausch could not evaluate whether Garcia posed a risk to Rausch; for example, he could know whether Garcia was in trouble with the Latin Kings and whether he might try to curry their favor by harming Riccardo.

Contrary to the Seventh Circuit's holding, other Circuits have ruled that the failure to respond to a prisoner's report of a threat to his safety is sufficient evidence to allow a conclusion of deliberate indifference. For example, in *Flint v. Kentucky Dep't of Corrections,* 270 F.3d 340 (6th Cir. 2001), the court held that a guard's failure to

respond adequately when a prisoner complains to a guard of likely violence from another inmate is sufficient to establish deliberate indifference. The court found that the defendant prison guard "disregarded the . . . articulated threat to [the attacked inmate's] health and safety. This scenario alone supports this Court's finding of deliberate indifference on the part of the Defendant." *Id.* at 354.

The underlying legal question here is one of great importance and one that constantly recurs. If a prisoner complains of likely violence from another inmate, is that enough to create knowledge sufficient for deliberate indifference? The Seventh Circuit says no because inmates might be making up the threat. App. at 9. Other Circuits have said that a complaint of potential violence is enough because inmates cannot protect themselves and because it is necessary to err on the side of protection rather than risk violence.

Second, the court stressed the absence of statistical evidence in the record to support Riccardo's claim of deliberate indifference. The court's approach here is so radical and unprecedented that it is worth quoting at length:

> "[Riccardo] might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks even though Riccardo was unable to show that Rausch should have deemed Garcia to present an especial risk.

> If violence is common at Centralia, and inmates have good track records in identifying potential aggressors, then guards who do not have their heads in the sand must actually (that is, subjectively) understand the risk an inmate faces when a protest is disregarded. But if violence is rare, or if there is poor correlation between inmates' alarms and subsequent violence, then Riccardo's initial protest would not have provided Rausch with actual knowledge of an impending assault. The record does not contain any evidence along these lines. That leaves only Riccardo's say-so, and for reasons we have already given a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion." App. at 10.

This emphasis on statistical evidence to prove deliberate indifference is in conflict with decisions of this Court and other Circuits and requires review by this Court to clarify the proof needed to show deliberate indifference. No decision of this Court, or any court in the country ever has emphasized such statistical evidence as proof of deliberate indifference. Such a standard would make it impossible for any prisoner to recover for deliberate indifference; such data does not exist and never can exist. No prison keeps data as to how many prison murders or rapes were preceded by reports of threats or how often prisoners reporting threats are not actually assaulted. No plaintiff ever could produce such data. The Seventh Circuit's requirement for such data would excuse prisons ignoring threats to inmates in all cases because they would know that no prisoner ever would be able to produce the evidence required concerning the frequency and accuracy of reports of threats by inmates.

Indeed, such a standard directly conflicts with *Farmer v. Brennan* and many decisions of other Circuit's holding that it is sufficient that prison officials actually knew that an inmate faced a serious harm and disregarded the risk by failing to take reasonable steps to avoid it. Contrary to the Seventh Circuit's holding, other circuits have found that statistics, such as the number of complaints filed, are irrelevant to determining whether there has been deliberate indifference. *See, e.g., Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998). Indeed, other circuits have ruled that a "prison official's knowledge of a substantial risk is a question of fact and can, of course, be proved by circumstantial evidence." *Hamilton v. Leavy*, 117 F.3d 742, 747 (3rd Cir. 1997); *see also Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998) ("The question of whether the official knew of the risk is subject to demonstration, like any other question of fact, by inference from circumstantial evidence.") This is the antithesis of the Seventh Circuit's emphasis on statistical evidence in this case.

Third, the Seventh Circuit stressed that there was not a showing of deliberate indifference because Riccardo complained to Rausch of a "hit" on his life, but that is not the harm which occurred; Riccardo was sexually assaulted and not killed. The Seventh Circuit stated: "Thus the risk that Riccardo professed to fear (a "hit") did not come to pass. Even under the law of negligence, this is an important distinction. If a school district entrusts a bus to a driver with a bad drinking record, and the tipsy driver runs the bus off the road while speeding, the school district is liable; but if instead there is an accident for which the driver is not at fault (a tree falls on bus), or the driver collapses of a heart attack while on the road, the district is not liable, because that was not the type of risk created or

increased by the negligent conduct even though hiring this particular driver was in the causal chain. The risk from which Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner." App. at 8.

But several other Circuits have come to exactly the opposite conclusion and have held that the prisoner need not have complained of the specific harm in order to show deliberate indifference. For example, in *Smith v. Brenoettsy*, 158 F.3d at 912 (emphasis added), the Fifth Circuit stated: "While a prisoner normally must complain about a specific threat to a supervisory official in order to give actual notice to that official, *we have never held that a supervisory official be warned of the precise act that the subordinate official subsequently commits.*" Likewise, the First Circuit has held that "knowledge may be averred generally" and that a prisoner need not have complained of the specific harm that occurred. *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002). Similarly, in another case involving a prisoner injured by an assault by another inmate, the Sixth Circuit concluded that "actual knowledge does not require that a prison official know . . . that a particular prisoner would be harmed in a certain way." *Curry v. Scott*, 249 F.3d 493, 507 (6th Cir. 2001).

Simply put, there is a split among the Circuits about a legal issue that constantly arises in courts throughout the country: What is sufficient evidence to demonstrate that a prison guard had sufficient knowledge of a threat to constitute deliberate indifference? Is a complaint by an inmate sufficient? The Seventh Circuit says no, but other

Circuits have come to an opposite conclusion. Is statistical evidence important in order to establish deliberate indifference? The Seventh Circuit says yes, but this creates a new and unprecedented requirement, which would mean that no prisoner ever will succeed in showing deliberate indifference because the data described by the Seventh Circuit does not, and never can, exist. Must the inmate complain of the specific harm which occurred? The Seventh Circuit says yes, but several other Circuits have come to an opposite conclusion. It is important that this Court grant review to resolve this conflict among the Circuits and clarify what evidence a prisoner must present to demonstrate "deliberate indifference" to a risk of violence.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHEN IT IS APPROPRIATE FOR A COURT OF APPEALS TO OVERTURN A JURY'S VERDICT THAT A PRISON GUARD WAS SUBJECTIVELY INDIFFERENT TO A PRISONER'S SAFETY AND THUS IS LIABLE FOR THE INJURIES SUFFERED

In *Farmer v. Brennan*, this Court emphasized that the question of whether a prison guard fails to respond adequately to a known risk, the subjective prong of the deliberate indifference inquiry, is inherently a factual question. The Court stated: "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial

risk from the very fact that the risk was obvious." 511 U.S. at 842.

The district court in this case, after hearing all the evidence, found that the jury verdict finding deliberate indifference was supported by the record. In denying the defendant's post-trial motion for a judgment as a matter of law, the court stated:

> "However, in this case, there is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was mere pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of 'asking' each inmate if he had a problem with the other. Credibility had to have been the key to the jury's analysis, thus Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it may very well have reached the same conclusion as the jury." App. at 46.

The Seventh Circuit, however, overturned the district court and the jury verdict concluding: "No reasonable jury could have found, in light of Riccardo's denial of a 'problem' with Garcia and Rausch's decision to act accordingly, that Rausch subjectively appreciated that his action would expose Riccardo to a substantial risk of serious harm." App. at 9. But as Judge Williams notes in her dissent from the denial of *en banc* review: "The jury heard evidence that Rausch put the two men in front of each other

to determine whether a problem existed. It is this act, which the majority uses to exonerate Rausch from liability. However, it is this very act which evinces Rausch's deliberate indifference as found by the jury and reiterated by the district court." App. at 29.

In other words, the Court of Appeals overturned the jury verdict and the district court by engaging in its own evaluation of the credibility of the witnesses and by reweighing the evidence in the case. The Court of Appeals approach directly conflicts with that followed in other Circuits and raises a crucial question for this Court to resolve: What is the appropriate role of the appellate court in reviewing a jury's determination that the second, subjective prong of the *Farmer v. Brennan* is met? For example, contrary to the standard used by the Seventh Circuit in this case, the United States Court of Appeals for the Tenth Circuit has said that overturning a jury verdict "is appropriate only when the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ from the conclusions to be drawn therefrom. . . . [A] directed verdict or judgment n.o.v. may not be granted unless the evidence points one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *The Travelers Insurance Co. v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1972). *See also Woods v. Lecureux*, 110 F.3d 1215 (6th Cir. 1997) (whether prison guard was subjectively indifferent is a question of fact for the jury and evidence is not to be reweighed by judges); *Stubbs v. Dudley*, 849 F.2d 83, 85 (2nd Cir. 1988) (the jury's verdict of a prison guard's deliberate indifference can be overturned only if "there can be but one conclusion

as to the verdict that reasonable persons could have reached.")

Likewise, many other Circuits in cases involving deliberate indifference by prison guards have stressed the need for great deference to the jury's fact-finding. In *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999), the court concluded that a reasonable jury could find deliberate indifference when a guard did not respond to a report of a threat by one inmate against another. Similarly, in *Hayes v. New York City Department of Corrections,* 84 F.3d 614, 621 (2d Cir. 1996), the court concluded that in a case where a prisoner was attacked by another inmate "the reasonableness of the defendant's actions . . . is suitable for resolution by a jury." In *Curry v. Scott,* 249 F.3d 493, 508 (6th Cir. 2001), the court said that to establish deliberate indifference the plaintiff only "need show that an issue of material fact exists as to whether the supervisory defendants were aware that Scott posed a risk of substantial injury to the inmates and were deliberately indifferent to that risk."

The approach taken by the Seventh Circuit in this case directly conflicts with that followed by the other Circuits. Whereas the other Circuits profess a need for great deference to a jury's finding that an officer is subjectively deliberately indifferent, the Seventh Circuit reweighed the evidence to come to its own conclusion. This case presents an issue that constantly recurs in prison litigation: what is the appropriate role for the court in examining a jury's verdict finding deliberate indifference?

CONCLUSION

Judge Ripple, in his dissent from the denial of *en banc* review, concisely explained the stakes of the Seventh Circuit's approach to defining deliberate indifference and of engaging in appellate review of jury determinations: "The panel majority not only deprives Mr. Riccardo of his right to a jury trial, it also takes a very significant step in depriving individuals incarcerated in this circuit of a realistic opportunity to meet their burden of proof in these cases." App. at 27. The Seventh Circuit's opinion conflicts with that of other Circuits in terms of how both the objective and subjective aspects of *Farmer v. Brennan*'s deliberate indifference test are to be defined and implemented. This is an issue that affects lawsuits by prisoners, and ultimately the treatment of prisoners, everywhere in the country. This Court should grant review to resolve the conflict in the Circuits and clarify this important area of the law.

Respectfully submitted,

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375 F.3d 521

United States Court of Appeals,
Seventh Circuit.

Anthony **RICCARDO**, Plaintiff-Appellee,
v.
Larry RAUSCH, Defendant-Appellant.

No. 02-1961.

Argued Oct. 22, 2003.
Decided Feb. 27, 2004.
Amended July 12, 2004.

Erwin Chemerinsky (argued), University of Southern California Law Center, Los Angeles, CA, for Plaintiff-Appellee.

Mary E. Welsh (argued), Office of the Attorney General, Civil Appeals Div., Chicago, IL, for Defendant-Appellant.

Before FLAUM, Chief Judge, and EASTERBROOK and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Anthony Riccardo, an inmate of the Centralia Correctional Center in Illinois, needed a new cellmate after his former cellmate complained about being housed with him. Normally that pairing would have been made by Centralia's placement office, but when the evening of May 28, 1997, arrived and some inmates remained unassigned after the regular placement officers had left, the task fell to Lt. Larry Rausch, who was serving the second shift. Rausch matched Riccardo with Juan Garcia, a pairing that should have lasted only until the placement officers on the day shift could review matters. Two days later Garcia

sexually assaulted Riccardo, who sued Rausch under 42 U.S.C. § 1983. A jury concluded that Rausch had subjected Riccardo to cruel and unusual punishment and awarded $1.5 million in compensatory damages. The district court entered judgment on this verdict, and Rausch appeals.

His lead-off argument is that Riccardo failed to use his administrative remedies. If so, then 42 U.S.C. § 1997e(a), part of the Prison Litigation Reform Act, forecloses this suit even though Riccardo challenges a discrete incident and wants a form of relief – money damages – that the administrative process in Illinois does not provide. See *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); *Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). Riccardo did file an administrative grievance, but Rausch contends it was too late (in February 1998, while Illinois sets a limit of six months) and asked the state to prosecute Garcia rather than do anything about Rausch and the classification system.

Prisoners must follow state rules about the time and content of grievances. See *Pozo v. McCaughtry,* 286 F.3d 1022 (7th Cir.2002); *Strong v. David,* 297 F.3d 646 (7th Cir.2002). Failure to do this means failure to use (and thus to exhaust) available remedies. Yet the state's administrative apparatus did not reject Riccardo's grievance as untimely; it accepted and denied the grievance on the merits. At the time of these events, Illinois permitted a filing after six months when the prisoner had good cause, see 20 Ill. Admin. Code § 504.810 (1997). The official handling the grievance must have found good cause; anyway, we held in *Pozo* that, when a state treats a filing as timely and resolves it on the merits, the federal judiciary will not second-guess that action, for the grievance has

served its function of alerting the state and inviting corrective action. 286 F.3d at 1025.

As for the content of this grievance; true enough, its main objective was to have Garcia prosecuted. (Riccardo deemed inadequate Garcia's punishment within the prison system.) But it also at least hinted at problems in prison administration. Riccardo wrote: "[T]he administration don't [sic] do there [sic] job. [A sexual assault] should've never [sic] happen again." This language is ambiguous. There are two principal ways to reduce the number of sexual assaults in prison: better steps *ex ante* to separate potential aggressors from potential victims; and harsher penalties *ex post* in order to deter future assaults. Riccardo did not distinguish between the two, and a prison administration receiving such a grievance should have considered both. Illinois has not adopted any rule governing the level of detail required of prisoners' grievances. "When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." *Strong,* 297 F.3d at 650. The document that Riccardo filed is at the border of intelligibility; it is hard to imagine much less that a prisoner could do and still alert the prison; yet this grievance *did* complain that Garcia had committed a rape and that "the administration don't do there [sic] job." A generous construction of this grievance would have induced the prison to consider the possibility that the guards could have prevented this assault. So we conclude that Riccardo exhausted the administrative process. If Illinois wants grievances to be more detailed, it

must adopt appropriate regulations and inform prisoners what is required of them. Riccardo is entitled to a decision on the merits of his constitutional claim.

Because Riccardo prevailed at trial, we recap the facts in the light most favorable to his position. Riccardo was anally raped by his cellmate at Cook County Jail, shortly after his conviction for aggravated assault. When he arrived at Centralia Correctional Center in November 1996, he told the prison psychologist that he did not feel safe. After a stint in segregation for violating prison rules, Riccardo declined to return to the general population. He told guards that a cellmate in the segregation unit had stolen some of his property and objected to spending another day with that cellmate. He believed that the responsible inmate belonged to the Latin Kings gang and that the Latin Kings may have been preparing to kill him – though he did not say why he believed this. But Centralia allows inmates to veto housing with persons they declare to be enemies, so the prison found Riccardo a new cellmate. When, after a few days, that cellmate objected to spending more time with Riccardo, another pairing was required. (The segregation unit was too crowded to permit Riccardo a cell of his own.)

During the afternoon of May 28, Garcia had offered to help Riccardo retrieve his stolen property. Riccardo took this as an ill omen rather than as a genuine offer of assistance and told Lt. Alemond that he feared for his life if celled with Garcia. Although Alemond said that he would "take care of it," he did nothing – he did not either find a cellmate for Riccardo or alert Lt. Rausch, Alemond's replacement on the next shift. About 9:30 that evening, Rausch brought Garcia to Riccardo's cell and told him that Garcia was his new cellmate. Before the cells were locked

for the night, Riccardo sought out Rausch in private and told him that he believed that the Latin Kings had a "hit" out on him, and that he feared for his life if celled with Garcia. Rausch replied that there was no place else to put Garcia (or Riccardo) that evening, and that he could not refuse housing while in segregation. Rausch then brought Riccardo and Garcia back together and asked each, in turn, if he had a problem with the other. Riccardo shook his head in the negative. Rausch took that as agreement to the assignment. That was Riccardo's last contact with Rausch. As we have mentioned, nothing untoward happened that evening or the next, but during the evening of May 30 Garcia compelled Riccardo to perform oral sex. The record does not suggest that this assault had any connection to the Latin Kings. During the time between assignment and assault, Riccardo did not ask for a different cellmate (though he did file two grievances on May 29 about other matters). Circumstances brought out at trial suggest that other guards should have recognized on May 30 that problems had developed between Riccardo and Garcia; their failure to intervene may be culpable but cannot be attributed to Rausch, whose liability depends exclusively on his actions the evening of May 28.

Rausch did not assault Riccardo and is not vicariously liable for Garcia's crime. Like other guards, however, Rausch was required to refrain from placing Riccardo in harm's way gratuitously. The qualification "gratuitously" is important, because prisons are dangerous places. Inmates get there by violent acts, and many prisoners have a propensity to commit more. Guards cannot turn away persons committed by the courts; nor do individual guards have any control over crowding and other systemic circumstances. All that can be expected is that guards act

responsibly under the circumstances that confront them. See *McGill v. Duckworth,* 944 F.2d 344 (7th Cir.1991). A guard may be responsible without being credulous. Some prisoners are manipulative and cry "wolf" in an effort to have a cell to themselves or choose a favored cellmate. Other prisoners perceive specters in every shadow, even though their fears are unsupported. (There is, for example, no reason to think that the Latin Kings ever had it in for Riccardo. He did not belong to a rival gang, and there is no history of violent or overtly hostile encounters between Riccardo and any gang member.) Guards therefore must discriminate between serious risks of harm and feigned or imagined ones, which is not an easy task given the brief time and scant information available to make each of the many decisions that fill every day's work.

The eighth amendment does not demand that guards perform this task flawlessly. It does not even hold them to the negligence standard. Liability is possible, instead, only when a guard is deliberately indifferent to a substantial risk of serious harm. See *Helling v. McKinney,* 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). "Deliberate indifference" means subjective awareness. See *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). It is not enough, the Court held in *Farmer,* that the guard *ought* to have recognized the risk. Instead, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837, 114 S.Ct. 1970.

Rausch contends that Riccardo did not face a "substantial risk of serious harm" from Garcia on the evening

of May 28, 1997; that, if such a risk was present, Rausch did not appreciate its existence; and that at all events he is entitled to qualified immunity because reasonable officers would not necessarily have understood that the law clearly required Riccardo and Garcia to be in separate cells. The first two matters (the objective and subjective components of the eighth amendment) are for the jury in the first instance, with appellate review limited to the question whether any reasonable juror could have found that the requisite level of risk existed, and that Rausch knew it. Immunity, however, is a matter of law for the court, to be decided without deference to the jury's resolution – and preferably before the case goes to the jury. See *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The district court brushed aside Rausch's invocation of immunity, writing that a guard cannot benefit from immunity if the action taken was not a reasonable response to a risk actually foreseen. That approach, which merges immunity and the merits, is incompatible with *Saucier* and its predecessors. See 533 U.S. at 203-06, 121 S.Ct. 2151. Immunity protects officials who act at the "hazy border" (*id.* at 206, 121 S.Ct. 2151) between the lawful and the forbidden. That Rausch may have overstepped the line does not mean that every reasonable officer would have been bound to know that Rausch acted improperly. We need not pursue the immunity defense, however, because *Saucier* calls on appellate courts to address the merits first, see *id.* at 201, 121 S.Ct. 2151, and Rausch is entitled to prevail outright: no reasonable juror could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk.

Now it might seem that Rausch *had* to appreciate the risk, because (a) Riccardo claimed to fear for his life if celled with any member of the Latin Kings, and (b) Garcia in fact harmed Riccardo. One problem with relying on how things turned out to show knowledge of risk beforehand is that Garcia did *not* act for the Latin Kings; he told Riccardo that he was fulfilling a personal fantasy, and Riccardo believed this explanation. Thus the risk that Riccardo professed to fear (a "hit") did not come to pass. Even under the law of negligence, this is an important distinction. If a school district entrusts a bus to a driver with a bad drinking record, and the tipsy driver runs the bus off the road while speeding, the school district is liable; but if instead there is an accident for which the driver is not at fault (a tree falls on bus), or the driver collapses of a heart attack while on the road, the district is not liable, because that was not the type of risk created or increased by the negligent conduct even though hiring this particular driver was in the causal chain. See, e.g., *Berry v. Sugar Notch Borough,* 191 Pa. 345, 43 A. 240 (1899). The risk from which Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner.

As for Rausch's subjective assessment: though Riccardo *initially* asserted mortal fear, when later asked whether he "had a problem" with Garcia he shook his head to give a negative answer. Rausch then had to decide which statement to believe. Riccardo argues, and the jury evidently concluded, that Rausch should have believed the first statement, communicated in private, rather than the second, communicated in Garcia's presence. A rational jury

could have thought that guards should give priority to statements made in private. (Rausch testified that, if Riccardo had claimed to "have a problem" with Garcia, they would have been separated; but Riccardo might have feared the consequences in a later encounter in the prison's general population.) Still, what Rausch should have believed is not the right question; we need to know what he *did* believe. No reasonable jury could have found, in light of Riccardo's denial of "a problem" with Garcia and Rausch's decision to act accordingly, that Rausch subjectively appreciated that his action would expose Riccardo to a substantial risk of serious harm.

As we have already explained, prisoners may object to potential cellmates in an effort to manipulate assignments, or out of ignorance; thus although a protest may demonstrate risk it does not necessarily do so. The Constitution does not oblige guards to believe whatever inmates say. How does a reasonable guard separate fact from fiction? Rausch knew when making the assignment at least two things beyond Riccardo's contradictory assertions. First, Rausch knew that Garcia was himself in segregation for protection *from* the Latin Kings (or at least a subset of them). Perhaps Garcia was manipulating the system himself, falsely asserting to fear the Latin Kings so that he could serve as their assassin; but at least at first cut Garcia could not be deemed a gang enforcer (and, as we learned *ex post,* his attack on Riccardo was neither a "hit" nor gang related). Second, Rausch knew that Garcia had a clean record in prison. He had not been disciplined for acts of violence (let alone for sexual assault). That makes it reasonable for Rausch to have deemed Riccardo's initial protestation unjustified. It is not as if Rausch housed Riccardo with a known sexual predator.

Lest this observation be thought to leave prisoners without protection from assaults by others with "clean" records, we add that there may be other ways to show both an objectively serious risk and the guards' knowledge of that risk. For example, Riccardo might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks even though Riccardo was unable to show that Rausch should have deemed Garcia to present an especial risk. If violence is common at Centralia, and inmates have good track records in identifying potential aggressors, then guards who do not have their heads in the sand must actually (that is, subjectively) understand the risk an inmate faces when a protest is disregarded. But if violence is rare, or if there is poor correlation between inmates' alarums and subsequent violence, then Riccardo's initial protest would not have provided Rausch with actual knowledge of an impending assault. The record does not contain any evidence along these lines. That leaves only Riccardo's say-so, and for reasons we have already given a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.

Rausch also was entitled to believe that his assignment of Garcia and Riccardo to share a cell would last for one night only. During the next day shift the placement

office, armed with better information, was supposed to make a fresh evaluation and, if appropriate, a new assignment. Apparently that did not happen; the record does not show why. (Maybe it did happen and the staff approved Rausch's action.) If Rausch *knew* that the staff charged with this responsibility routinely failed to carry it out, then he might have been obliged to take additional precautions (such as separate interviews of Garcia and Riccardo to probe these issues more deeply) before making an assignment. Rausch himself testified that separate interviews would have been better practice, but the Constitution does not enforce all "better practices"; this is one respect in which the eighth amendment standard differs from the negligence standard. But Riccardo does not contend, and the record does not demonstrate, that disregard of the classification system at Centralia was so common that Rausch was bound to know that his assignment would last indefinitely. Nor was Rausch bound to foresee that, if Riccardo was in genuine fear, he would neglect to complain the next day, when he readily could have done so. (Recall that Riccardo filed two grievances on May 29 about other subjects.) Riccardo testified that he was too terrified to protest and was put off by Rausch's assertion that prisoners in segregation can't refuse assignments; yet grievances are confidential (so Garcia would not have known), and prisoners often appeal over the head of a guard who has told them that something can't or won't be done. Riccardo had already objected to, and obtained the removal of, at least one cellmate assigned to him in segregation. At all events, the question on the table is what Rausch knew (or deliberately avoided learning) on May 28; and there is no evidence that Rausch subjectively believed that Riccardo would fail to use his opportunity to seek further review the next day.

Illinois is free, if it wishes, to give prisoners veto power over the identity of their cellmates. But the eighth amendment does not do so of its own force, and prisoners cannot use the Constitution to achieve this control indirectly by making unsubstantiated assertions. The constitutional question is not what Riccardo (initially) said, but what Rausch actually believed. Some prisoners are manipulative, some are mistaken, and some are not only honest but also accurate. The Constitution does not oblige guards to assume (on pain of absolute liability if an assault later occurs) that all prisoners are in the third category; *Farmer* articulates a different, and more demanding, standard, preserving room for both independent judgment and honest mistake on the guards' part. This record does not permit a reasonable jury to find that Rausch knew or deliberately disregarded the fact that his actions subjected Riccardo to a substantial risk off serious harm, so the judgment is

REVERSED.

WILLIAMS, Circuit Judge, dissenting.

While I agree that Anthony Riccardo did in fact exhaust his administrative remedies, I disagree with the majority's decision to overturn the judgment in this action as a reasonable jury had ample evidence to find that Lieutenant Larry Rausch was deliberately indifferent to the substantial risk of harm Riccardo faced by being celled with Juan Garcia. Therefore, I respectfully dissent.

On May 30, 1997, while celled with Juan Garcia, a known member of the Latin Kings, Riccardo's head was forcibly shaven by Garcia such that Riccardo was "bleeding pretty bad." Tr. I at 81-82. Garcia then attempted to sodomize Riccardo; however, he was able to resist. Tr. II at

50. After Riccardo resisted, Garcia ejaculated on Riccardo's feet. Tr. I at 83-84. Riccardo was then forced to perform oral sex on Garcia for 15 to 20 minutes. *Id.* The assault ended when an officer walked by the cell. As the majority notes, the events which give rise to Lt. Rausch's liability are limited to the happenings on the evening of May 28, 1997, when Lt. Rausch replaced Lt. Alemond[1] as the lieutenant in charge of the segregation and receiving units at Centralia prison.[2]

On appeal, Lt. Rausch contends, and the majority agrees, that the evidence introduced at trial was legally insufficient to support a finding of liability under the Eighth Amendment. To sustain overturning a jury verdict, the record must demonstrate no "legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *Payne v. Milwaukee County,* 146 F.3d 430, 432 (7th Cir.1998). While undertaking this assessment, we analyze the "the totality of the evidence," *Sheehan v. Donlen Corp.,* 173 F.3d 1039, 1043 (7th Cir.1999), and are obliged to leave the judgment undisturbed unless the moving party can show that "no rational jury could have brought in a verdict against him." *EEOC v. G-K-G, Inc.,* 39 F.3d 740, 745 (7th Cir.1994). It is not within the province of the appellate courts to "reweigh the evidence." *Knox v. State of Indiana,* 93 F.3d 1327, 1332 (7th Cir.1996). Lastly, and most importantly, all reasonable inferences must be

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[1] Riccardo previously complained to Lt. Alemond that he feared being celled with Garcia because he was a Latin King, however, the record reveals that this previous complaint was not voiced to Lt. Rausch and therefore may not support a finding of liability against him.

[2] Lt. Rausch testified that he had no recollection of the events which transpired on May 28. Tr. III at 68. Thus, the jury was left with Riccardo's testimony concerning the events of that evening.

analyzed in the light most favorable to Riccardo as the non-moving party. *Sheehan,* 173 F.3d at 1044.

In *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) the Court bifurcated the standard for Eighth Amendment liability into an objective element and a subjective element. First, the potential harm to the inmate must be objectively serious. *Id.* (citing *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Second, under the subjective prong, the prison official must "deliberately disregard" this potential harm by being "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [also] draw[ing] the inference." *Id.* at 838, 114 S.Ct. 1970.

The second inquiry is a question of fact, sustainable through circumstantial evidence, *id.* at 842, 114 S.Ct. 1970, mandating an "inquiry into a prison official's state of mind." *Id.* at 837, 114 S.Ct. 1970 (quoting *Wilson,* 501 U.S. at 299, 111 S.Ct. 2321). "A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *McGill v. Duckworth,* 944 F.2d 344, 349 (7th Cir.1991) (reasoning that the scienter requirement is satisfied when a prison guard, "[s]uspect[s] something is true but shut[s] [his] eyes for fear of what [he] will learn" or "[goes] out of [his] way to avoid acquiring unwelcomed knowledge").

The Supreme Court also cautioned that an "Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of

serious harm." *Farmer,* 511 U.S. at 842, 114 S.Ct. 1970. Likewise, a claimant need not prove that a prison official was aware of the specific type of harm which befell the prisoner, only that the prison official was aware that a substantial risk of some type of danger existed. *See Haley v. Gross,* 86 F.3d 630, 643 n. 33 (7th Cir.1996) (applying *Farmer,* 511 U.S. at 843, 114 S.Ct. 1970) (upholding jury verdict for $1.65 million based on a finding that prison guards were deliberately indifferent by failing to respond to a prisoner's repeated request to be removed from cell when his cellmate set fire to cell causing the cellmate's death and plaintiff's severe burns). Thus, it was Riccardo's burden to show that Lt. Rausch actually knew that there was a substantial risk that Garcia would harm Riccardo. *Id.* However, Lt. Rausch would be shielded from liability if no objectively serious risk existed, he was unaware of the impending risk, *McGill,* 944 F.2d at 349, or he took reasonable steps to abate it, whether successful or not, *Farmer,* 511 U.S. at 844, 114 S.Ct. 1970.

Admittedly, there is evidence in the record to support a finding that Garcia did not objectively pose a substantial threat to Riccardo – namely, the fact that Garcia was also placed in segregation for "enemy protection," allegedly from the Latin Kings, and that Garcia had no history of sexual assault. However, that is not the standard by which this case should be reviewed. The standard is whether there exists a legally sufficient evidentiary basis for a reasonable jury to find in favor of Riccardo. *Payne,* 146 F.3d at 432.

A jury could have reasonably believed that Lt. Rausch was deliberately indifferent to the substantial risk of harm to Riccardo. It is undisputed that Garcia was a member of the Latin Kings. In their first interaction, Riccardo privately

pulled Lt. Rausch aside and expressed his fear of being celled with Garcia. Thus, Riccardo has presented sufficient evidence to support the finding that Lt. Rausch was made aware of the potential harm. *See McGill,* 944 F.2d at 349. The jury could have further found that Lt. Rausch's decision to question Riccardo in front of Garcia was not a reasonable way to abate the potential danger to Riccardo. Moreover, Lt. Rausch admitted that "[i]f [Riccardo] would have told me he feared for his life, if he refused housing or thought there was a threat to his safety[,] he would not have been placed – they would not have been placed together." Tr. III at 73. Thus, a jury could have determined that Lt. Rausch's admission, coupled with his prior statements to Riccardo on May 28 that Riccardo could not turn down a housing assignment in segregation, and that Riccardo could not be moved to another cell due to a lack of space, amounted to Lt. Rausch "deliberately" avoiding learning that Riccardo was in danger.[3] Such an analysis avoids the use of *ex post* occurrences, such as the fact that Garcia did in fact assault Riccardo, to sustain a finding of deliberate indifference. Moreover, the fact that Lt. Rausch

[3] Significantly, Riccardo was actually housed in the receiving unit as opposed to the segregation unit during the assault. The jury heard testimony that the receiving unit is only used to house inmates when the segregation unit is full. Tr. I at 24. Thus, Lt. Rausch's statement to Riccardo that there was no place else to house him carried even greater weight. The jury also heard testimony that it would have required more work for Lt. Rausch to move Riccardo from a cell in receiving to a cell in segregation due to the time of the alleged refusal and the occupancy of receiving and segregation, Tr. III at 75-77; further supporting Riccardo's belief that any additional complaints about his cell assignment would have been futile. Finally, the jury was told a prisoner may be moved from one cell to another at any time. Tr. I at 25. Therefore, the jury had ample evidence to support its finding that Lt. Rausch's actions rose to the level of deliberate indifference.

is able to point to evidence in the record to support his position does not mandate reversal of the jury's verdict. Our sole duty as an appellate court is to analyze whether the record supports the jury's determination. It is not our function to reweigh the evidence. *Knox,* 93 F.3d at 1332.

I am further troubled by the majority's reliance on Riccardo's second statement to Lt. Rausch (made in front of Garcia) to sustain overturning the jury's verdict. As it stands, the deliberate indifference inquiry is an inherently factual determination, *Farmer,* 511 U.S. at 842, 114 S.Ct. 1970, which requires an "inquiry into a prison official's state of mind," *id.* at 837, 114 S.Ct. 1970.[4] Thus, whether this second statement is used to support the assertion that there was no "objective" risk to Riccardo or that Lt. Rausch was stripped of his "subjective" knowledge of the harm, it is clear that Lt. Rausch's credibility and sincerity are integral components to the usefulness of this interaction. In essence, the majority accepts Lt. Rausch's assertion that his second discussion with Riccardo in front of

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[4] The Supreme Court's discussion only further highlights the propriety of allowing a jury to make this determination:

> When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough to merely find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly.

Id. at n. 8, 114 S.Ct. 1970; *accord Lewis v. Richards,* 107 F.3d 549, 556 (7th Cir.1997) (Flaum, C.J., concurring) ("In view of the Supreme Court, the safeguard against jurors whose outrage at prison violence might lead them to sanction officials in the absence of an Eighth Amendment violation is not a relaxed summary judgment standard, but jury instructions that properly convey the applicable law. Lower federal courts, in my view, should exhibit a similar faith in the willingness of juries to follow the law.").

Garcia was a sincere investigation of the potential risk to Riccardo. However, the jury found otherwise. Further, when asked to review the defendant's Rule 50 motion, the district court aptly stated,

> [T]here is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was mere pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of "asking" each inmate if he had a problem with the other. Credibility had to have been the key to the jury's analysis, thus the Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it may well have reached the same conclusion as the jury. [. . .]
>
> [A] prison official will only be freed from liability if he responded *reasonably* to the risk. As mentioned above, Rausch's method of questioning could be perceived as deliberately forcing plaintiff to make a Hobson's choice.

Riccardo v. Rausch, No. 99-CV-372-CJP, at 15 (S.D.Ill. Mar. 7, 2002) (order denying F.R.C.P. Rule 50(b) motion) (citations omitted) (emphasis in original). By taking Lt. Rausch at his word, the majority's decision has the effect of immunizing prison officials from liability based on potentially unreasonable or contrived actions, and sanctions Lt. Rausch's admittedly unreasonable behavior.

In an attempt to break the causal link between Lt. Rausch's actions and the harm to Riccardo, the majority asserts that "the risk that Riccardo professed to fear (a 'hit') did not come to pass." Majority opinion at 526. The inquiry, however, is not whether "a hit" was actually put out on Riccardo as that would constitute the sort of impermissible *ex post* determination eschewed by the majority. Rather, the focus is solely on whether Rausch was made aware that a substantial risk of *some type* of danger existed prior to the actual event. *See Haley,* 86 F.3d at 643 n. 33. Under the majority's analysis are we to presume that Riccardo's pleas for protection would only guard against murder or physical beating? For the purposes of an Eighth Amendment inquiry, in the prison context, I find no real distinction between "a hit" and a sexual assault.

The majority also frees Lt. Rausch of liability based on the assertion that Lt. Rausch was under no duty to foresee that Riccardo would not complain to other prison officials between May 28, the date of Lt. Rausch and Riccardo's interaction, and May 30, when the assault actually took place. The record reveals, however, that Garcia closely watched Riccardo's actions impeding Riccardo's ability to have a private conversation with prison guards outside of Garcia's presence. Tr. I at 76-82; Tr. II at 42-43. Further, when Riccardo attempted to alert prison officials, Garcia responded with escalating violence. Tr. II at 46-47. In light of Riccardo's reasonable belief that he could not refuse his housing assignment and that there was no other available cell, *see* note 3, *supra,* Riccardo did not realistically have the ability to complain to other guards without alerting Garcia and incurring his wrath.

The majority's decision to question the adequacy of Riccardo's pleas for protection by requiring evidence

concerning the overall number of sexual assaults at Centralia prison is also curious. *See Lewis,* 107 F.3d at 556 (Flaum, C.J., concurring) ("[T]he majority's emphasis upon the adequacy of Lewis's pleas for protection strikes me as inappropriate.") The prison recognizes that "some prisoners are manipulative and cry 'wolf'," majority opinion at 525, and has created a procedure to deal with this recurring possibility. A prisoner's request for a cell transfer is always honored if the prisoner alleges a fear for his personal safety, Tr. I at 44, but the prison deals with potential frivolity by treating every request as a potential disciplinary violation. *Id.*[5] Thus, the prison has created a procedure whereby a prisoner is moved first, and questions concerning the sincerity of the request are asked later. In addition, the inquiry under the Eighth Amendment is an individualized one, i.e., Riccardo was required to prove, based on the individual facts of his case, that he was subjected to an objectively serious harm and that Lt. Rausch was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]." *Farmer,* 511 U.S. at 838, 114 S.Ct. 1970.

Finally, though unpursued by the majority, defendant argues that should a constitutional violation be found, he is nevertheless entitled to qualified immunity. According to Rausch, previous case law must show that "no reasonable prison official would have believed it was constitutional either to cell an inmate with someone who gave conflicting answers when asked (in the other inmate's presence) if he had a problem with that inmate, or to rely on a policy

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[5] Major Lawrence Jefferson was clear that "if [a prisoner is] just refusing housing just to refuse housing with no reason, then we'll move him for that, but he'll get a ticket for that." *Id.*

requiring review of all placement decisions for suitability within hours." Appellant's Brief at 33. However, the Supreme Court in *Hope v. Pelzer*, expressly rejected the notion that in order for a right to be "clearly established" previous case law must contain facts which are "materially similar" to the facts contained in the underlying action. 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *see also Burgess v. Lowery,* 201 F.3d 942, 944-45 (7th Cir.2000). Rather, the Court focused on whether the prior case law would place officers on notice that their conduct is unlawful. *Id.* It is clear that *Farmer* put prison guards on notice that they have a duty, under the Eighth Amendment, to protect inmates from being gratuitously beaten or raped by other inmates. *See id.* at 833, 114 S.Ct. 1970; *see also Haley,* 86 F.3d at 646 (rejecting qualified immunity defense in light of *Farmer* decision which further elucidated "deliberate indifference" standard).

In light of the aforementioned, I must agree with the trial court that a reasonable jury had ample evidence to sustain this verdict and thus I respectfully dissent.

Before FLAUM, Chief Judge, and POSNER, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, EVANS, and WILLIAMS, Circuit Judges.[†]

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on March 12, 2004. In response to this petition, the panel has amended its opinion; the amendments are reflected in the immediately preceding revised opinion. A majority of the judges on the panel voted to deny rehearing. A judge called for a vote on the petition for

[†] Circuit Judge Sykes did not participate in the consideration or decision of this case.

rehearing en banc, but a majority of the active judges did not favor rehearing en banc. Accordingly, the petition is denied.

RIPPLE, Circuit Judge, with whom ROVNER, DIANE P. WOOD and WILLIAMS, Circuit Judges, join, dissenting from the denial of rehearing en banc.

Today, the court allows to stand the decision of a panel majority that imposes on prison inmates a new and impossibly high standard of proof for establishing deliberate indifference in prison condition cases. The panel majority strongly suggests that, in order to show deliberate indifference, a prisoner must not only identify with particularity the harm he fears but also bolster his own account with a special showing containing material such as statistical evidence of a "strong correlation between prisoners' professions and actual violence." *Riccardo v. Rausch,* at 527. Neither of these requirements find support in circuit or Supreme Court precedent. Consequently, the panel majority's imposition of these requirements not only does violence to our Eighth Amendment jurisprudence, but it also effectively amends, without any legislative mandate, the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 for cases brought by prisoners.

1.

Mr. Riccardo told Lt. Rausch that the Latin Kings had put out a "hit" on him and that placement in a cell with Garcia, a known Latin King, would endanger his life. Two days later, Mr. Riccardo was forced to perform sexual acts with Garcia. The panel majority nevertheless concludes that this evidence is not sufficient to establish that Lt.

Rausch should have appreciated a serious risk to Mr. Riccardo because the "risk from which Riccardo sought protection was not realized." *Id.* at 526. In short, in the panel majority's view, because Mr. Riccardo was raped, but not killed, Lt. Rausch cannot be held liable for his failure to respond to Mr. Riccardo's fears.

The Supreme Court in *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), eschewed this sort of distinction. The Court made clear that a prison official cannot escape

> liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is *whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," Helling* [*v. McKinney,* 509 U.S. 25, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993),] and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.

Id. at 843, 114 S.Ct. 1970 (emphasis added). Just as Mr. Riccardo did not need to identify the member of the Latin Kings who would mete out the retaliatory action that he feared, he did not need to identify the specific sort of bodily harm that would be inflicted upon him. Indeed, our case law makes crystal clear that such precision with respect to identifying risks is not required:

> While there must be some link between the risk of which the official was aware and the harm that actually occurred – as it would be unfair to hold officials liable for risks they could not have anticipated simply because they ignored other unrelated risks – prison officials need not be specifically aware of the precise risk that unfolds.

Haley v. Gross, 86 F.3d 630, 643 n. 33 (7th Cir.1996). Mr. Riccardo feared reprisal by the Latin Kings. Garcia, a member of that gang, committed an act of physical violence upon Mr. Riccardo. The fact that Mr. Riccardo did not suffer a worse fate does not negate the seriousness or the validity of the threat to Mr. Riccardo that was communicated to Lt. Rausch.

2.

The panel majority further opines that Mr. Riccardo might have overcome the infirmity in his case by showing

> that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks. . . .

Riccardo, at 527. Neither this court, other courts of appeals, nor the Supreme Court ever has required a showing that expressed fears and violence were related in some statistically significant way. It always has been sufficient that the prisoner articulated his fear, that the prison

official believed the inmate, but that the official failed to take reasonable actions to protect the prisoner from harm. We often have stated that

> [i]f "the *circumstances* suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Sanville v. McCaughtry, 266 F.3d 724, 737 (7th Cir.2001) (quoting *Farmer,* 511 U.S. at 842-43, 114 S.Ct. 1970; emphasis added). The question of whether the prison official had the "requisite knowledge is a question of fact" reserved for the jury. *Id.* Requiring the sort of statistical evidence suggested by the panel majority in order to establish the existence of such a risk imposes on inmates a practical burden that is impossible for prisoners to meet. Prisoners certainly should not be relieved of meeting their burden of proof, but, like other litigants, they ought to be permitted to come forward with any evidence, direct or circumstantial, that is probative of the knowledge of prison officials concerning threats reported to them. The judicial inquiry ought not be whether there was *statistical* evidence from which a jury could conclude that the threat was "real" or should be taken seriously, but whether the record contains *any* evidence from which the jury reasonably could conclude that the prison official knew that the prisoner was subject to a risk of serious harm. Moreover, there indeed may be times and circumstances when the representation of the prisoner will be a sufficient basis to require action on the part of the prison official. I see no

reason for a categorical rule that, under no circumstances, can such a representation be sufficient.

There is no question that Mr. Riccardo articulated to Lt. Rausch his fear of physical violence if celled with a member of the Latin Kings. In violation of Centralia's own policy – one presumably founded on a recognized correlation between complaints and violence – Lt. Rausch did not move Mr. Riccardo to another cell; instead, Lt. Rausch forced Mr. Riccardo to articulate any concerns in the presence of the very source of Mr. Riccardo's fears, Garcia. As the district court determined in rejecting the defendant's Rule 50 motion, there was

> ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was a mere pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of "asking" each inmate if he had a problem with the other. Credibility had to have been the key to the jury's analysis, this Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it may very well have reached the same conclusion as the jury. R.64 at 15-16.

The panel majority makes clear its disagreement with the jury's view of the evidence. The evidence in favor of Mr. Riccardo may not be overwhelming, but it is certainly not legally insufficient. When the evidence is viewed in the

light most favorable to Mr. Riccardo, as it must be, a jury could reasonably conclude that Lt. Rausch knew of a serious risk of harm to Mr. Riccardo but failed to take reasonable steps to prevent it. The panel majority may have come to a different conclusion if it had sat as the trier of fact, but its disagreement in that respect is certainly not an appropriate occasion for revising Eighth Amendment and Rule 50 standards.

The panel majority opinion not only deprives Mr. Riccardo of his right to a jury trial, it also takes a very significant step in depriving individuals incarcerated in this circuit of a realistic opportunity to meet their burden of proof in these cases. I therefore respectfully dissent from the denial of rehearing en banc.

WILLIAMS, Circuit Judge, with whom RIPPLE, ROVNER, and DIANE P. WOOD, Circuit Judges, join in dissenting from the denial of rehearing en banc.

The majority's opinion has incorrectly resolved and unjustifiably reframed both the Eighth Amendment standard for deliberate indifference as well as the Rule 50 standard to set aside a jury verdict.

With regard to the Eighth Amendment inquiry, the majority opinion highlights a major gap in the case law. Particularly, what is required to prove the objective prong of the deliberate indifference standard? The Court in *Farmer v. Brennan,* 511 U.S. 825, 834 n. 3, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) did not address this issue. On page 526-27, the majority asks a plethora of questions which go to this issue, i.e., the overall threat of violence at the prison. Perhaps the dearth of case law on this point is due in part to the general knowledge that prisons are dangerous places where rape and assault occur frequently and

therefore threats, such as the one in this case, must be handled with more caution than exhibited by Rausch. *See* Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601-02 (2004) ("The purpose of this chapter is to: (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States. (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape.") ("Congress makes the following findings: (2) Insufficient research has been conducted and insufficient data reported on the extent of prison rape. . . . Many inmates have suffered repeated assaults. (13) The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution."). Centralia Prison's policy, to move prisoners first and discipline them later for baseless requests, is further proof of the objective danger. Again, evidence of the prison's policy does not hold Rausch liable for mere negligence; rather, it reflects the understood environment in the prison, as accepted by prison officials, guards, and administrators, that threats of violence have a high probability of leading to attacks. Riccardo, therefore, proved that the asserted danger was objectively serious.

Under the more specific inquiry of *Farmer's* subjective prong, the prison official must "deliberately disregard" a potential harm by being "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [also] draw[ing] the inference." *Id.* at 838, 114 S.Ct. 1970. This seems to me to create two questions: (1) what facts were presented to Rausch, and (2) did he accept them as true or did his actions evince his intent to purposefully ignore those apparent facts? Once again, the inquiry is a particularized one, focused on the officer's knowledge. Without repeating what I have already set out in my dissent, the jury was presented with evidence that

Riccardo told Rausch he did not want to be celled with Garcia because he was in fear of an attack. "A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *McGill v. Duckworth,* 944 F.2d 344, 349 (7th Cir.1991). Therefore, contrary to the majority's assertion, the first part of this inquiry is satisfied.

Accepting the majority's point that Riccardo's mere "say-so" is not enough to establish Eighth Amendment liability, there were plenty of "objective indicators" to support the jury's finding that Rausch's actions amounted to deliberate indifference. The jury heard evidence that Rausch put the two men in front of each other to determine whether a problem existed. It is this act, which the majority uses to exonerate Rausch from liability. However, it is this very act which evinces Rausch's deliberate indifference as found by the jury and reiterated by the district court. What is more, this court has already defined such action as unacceptable under the Eighth Amendment. *Id.* at 349 (reasoning that the scienter requirement is satisfied when a prison guard, "[s]uspect[s] something is true but shut[s] [his] eyes for fear of what [he] will learn" or "[goes] out of [his] way to avoid acquiring unwelcomed knowledge"). The jury found that no reasonable guard would think that asking Riccardo to admit fear of Garcia with Garcia present, would illicit an honest response. Again, it is this act that crosses the line. Recognizing that these specific actions were inconsistent with the Eighth Amendment would not create *per se* liability for prison officials. Therefore, I respectfully dissent from the court's decision not to rehear this case en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTHONY RICCARDO,	)	
Plaintiff,	)	
V.	)	Civil No. **99-372-CJP**[1]
LT. LARRY RAUSCH,	)	
Defendant.	)	

ORDER

(Filed Mar. 07, 2002)

PROUD, Magistrate Judge:

Plaintiff Anthony Riccardo, an inmate at Centralia Correctional Center, was sexually assaulted in May 1997 by fellow inmate Juan Garcia[2] Plaintiff sued defendant Lt. Larry Rausch, the prison guard who had personally celled plaintiff and Garcia together, asserting that Rausch celled plaintiff and Garcia together even after plaintiff told Rausch he feared for his life if he and Garcia were celled together. At trial Lt. Rausch testified that he had no recollection of the events at issue. A jury found that Lt. Rausch had been deliberately indifferent to a substantial

[1] Pursuant to 28 U.S.C. § 636(c), upon the consent of the parties to have this case tried or otherwise resolved by a U.S. Magistrate Judge, this matter was transferred from Chief U.S. District Judge G. Patrick Murphy to U.S. Magistrate Judge Clifford J. Proud. (Docs. 45 and 46).

[2] Defendant does not seriously argue that a sexual assault did not occur, although he intimates as such in connection with his attack on the award. Therefore this Court will only observe that plaintiff's testimony and the Illinois Department of Corrections' report concluding that, based on incident reports, voluntary statements, physical injuries, and polygraph results, a sexual assault did occur, were unrefuted.

risk of serious harm, in violation of the Eighth Amendment's prohibition against infliction of cruel and unusual punishment; plaintiff was awarded $1.5 million.

Defendant Rausch is now before the Court pursuant to Federal Rules of Civil Procedure 50(b) and 59, seeking judgment as a matter of law and/or a new trial, (Docs. 56 and 58). Defendant presents the following arguments:

1. Plaintiff did not establish that he faced an objectively substantial risk of serious harm, or that defendant possessed the requisite subjective knowledge from which deliberate indifference could be inferred;

2. Defendant's actions were not the proximate cause of plaintiffs injuries, in that the causal chain was broken;

3. Defendant is entitled to qualified immunity; and

4. The damages award is grossly excessive.

(Docs. 56 and 58).

In contrast, plaintiff relies heavily on the fact that, in a situation such as this, where the jury had to choose between two possible interpretations of events, so long as there is sufficient evidence to support the jury's verdict, that verdict should not be upset. *Cygnar v. City of Chicago,* 865 F.2d 827, 834-835 (7th Cir. 1989). More specifically, plaintiff argues that the verdict reflects the jury's inference from the evidence that Lt. Rausch acted (or failed to act, depending on one's perspective) out of deliberate indifference, Plaintiff further contends that defendant's assertion that the causal chain was broken is speculative at best. Defendant's assertion of qualified immunity is

countered by citation to *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Billman v. Indiana Department of Corrections*, 56 F.3d 785 (7th Cir. 1995), for the proposition that, at the time of the May 1997 assault, it was clearly established that cell placement decisions can violate the Eighth Amendment. Finally, plaintiff notes numerous multi-million dollar verdicts from non-prisoner sexual assault cases as precedents for the size of the award in this case.

Applicable Legal Standards

Insofar as defendant seeks judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(b), the relevant inquiry is "'whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party against whom the motion is directed.'" *Cygnar v City of Chicago*, 865 F.2d 827, 834 (7th Cir. 1989) (quoting *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir.1985)). The Court may not "resolve conflicts in testimony or weigh and evaluate the evidence, functions that are reserved to the fact finder." *Cygnar*, 865 F.2d at 834 (citing *Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir.1988)).

A slightly different standard is applicable to motions for new trial under Federal Rule of Civil Procedure 59, "'The test to be applied in determining whether a motion for a new trial should be granted is whether "the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving."'" *Cygnar*, 865 F.2d at 834-835 (quoting *General Foam Fabricators v. Tenneco Chemicals, Inc.*, 695 F.2d 281, 288 (7th Cir.1982)).

The Evidence

Defendant Rausch's relevant contact with plaintiff was very brief; he was merely the one who celled plaintiff and his attacker together the night of May 28, 1997 – approximately 48 hours before plaintiff was allegedly forced to perform oral sex on his cellmate, inmate Garcia. Although it is undisputed that Rausch did cell plaintiff and Garcia together, Rausch has no recollection of any of the relevant events, (Tr. III, p. 69). In any event, a longer, more detailed chronology of events, drawn from the entire record, is necessary to understanding both plaintiff's claim for damages and defendant's arguments regarding deliberate indifference and proximate cause.

In 1996, plaintiff Anthony Riccardo was convicted of aggravated assault – stalking a former girlfriend – and sentenced to 39 months imprisonment, with credit for 152 days. (*See* Tr. I, p. 58; and Plaintiffs Exhibit 22 (12/2/96 Mental Health Report)). It is unrefuted that in October 1996, while in the Cook County Jail, plaintiff was anally raped by his cellmate. (Tr. I, pp. 60-61; *see also* Plaintiff's Exhibit 22 (6/19/97 Mental Health Evaluation)). Upon arrival at Centralia Correctional Center in November 1996, plaintiff voiced concerns about his safety, and he indicated to the prison psychologist that be planned to seek protective custody. (Tr. I, p. 61; and Plaintiff's Exhibit 22 (11/19/96 Mental Health Evaluation)). A psychologist subsequently noted that plaintiff's initial adjustment to his new environment was "slightly difficult." (Plaintiff's Exhibit 22 (12/2/96 Mental Health Evaluation)).

A few months later, in April 1997, plaintiff was ticketed and placed in segregation for placing a towel over the bathroom window in order to prevent a female guard from

being able to see him while be was using the bathroom. (Tr. I, pp. 62-63; Plaintiff's Exhibits 6 and 9). In a related grievance, plaintiff explained that be had covered the window because he had been raped and consequently had issues about privacy. (Tr. I, pp. 62-63; Plaintiff's Exhibits 6 and 9). Plaintiff's initial punishment of one month in segregation was reduced to 15 days, (Plaintiff's Exhibit 9). On May 21, 1997, plaintiff completed his time in segregation and was sent to a cell in the receiving unit to await placement back in the general prison population. (Tr. I, p. 63).

While in receiving, plaintiff's personal property was taken, presumably by his cellmate, who was a member of the Latin King gang. (Tr. I, pp. 63-66; Plaintiff's Exhibit 6). Plaintiff was seen telling a guard about his missing property; he then became fearful of retaliation and refused to return to his cell (Tr. I, pp. 67-68). Consistent with prison policy, plaintiff's desire not to be celled with a purported enemy was honored, resulting in his immediate return to segregation for refusing housing. (Tr. I, pp. 25, 29 and 68; Plaintiffs Exhibit 4 (5/21/97 6:30 p.m. entry)). Plaintiff was placed in "pre-disciplinary detention" so that his claimed enemies could be confirmed. (Tr. I, p. 67-68; Plaintiff's Exhibit 7). Essentially, if a prisoner's request for different housing is substantiated, no disciplinary action is taken. (Tr. I, 43-45). On May 22, 1997, apparently because of a housing crunch in segregation, plaintiff was moved to a cell in the adjacent receiving building. ((Plaintiff's Exhibit 4 (5/22/97 2:15 p.m. entry); Tr. III, pp. 74-77).

On May 28th, plaintiff spoke with inmate Garcia, who purportedly could help plaintiff get his property back from the gang members who had taken it. (Tr. I, p. 70). Garcia was a known Latin King, although he allegedly had Latin

King enemies, too. (Tr. III, pp. 55-56; Plaintiff's Exhibit 11). Plaintiff "didn't feel comfortable" after speaking with Garcia, so plaintiff spoke with Lt. Alemond, the first shift segregation lieutenant, explaining that he did not want to be celled with inmate Garcia – that he feared for his life. (Tr. I, pp. 72-73). According to plaintiff, Lt. Alemond, who as segregation lieutenant was in charge of housing decisions during his shift, assured him that he would "take care of it" (Tr. I, p. 73; Plaintiff's Exhibit 3). However, around 9:25 p.m. that night, defendant Rausch, the second shift segregation lieutenant, arrived with plaintiffs new cellmate, inmate Garcia. (Tr. I, pp. 73-74). Plaintiff describes panicking, and eventually getting Lt. Rausch aside in the nearby day room so that he could explain that he "fear[ed] for his life" because the Latin Kings had a "hit" on him, that Garcia was a Latin King, and that Lt. Alemond had agreed earlier that plaintiff would not be celled with Garcia. (Tr. I, pp. 74-75). According to plaintiff, Lt. Rausch told him that he, Rausch, would "straighten this out." (Tr. I, p. 75). Rausch then brought plaintiff and Garcia together and asked each, in turn, if he had a problem with the other. (Tr. I, p. 75). Garcia stated that he did not have a problem with plaintiff; plaintiff, feeling like he was "on the hot seat," shook his lead in the negative. (Tr. I, p. 75). Consequently, Garcia and plaintiff were celled together. Later that night, Garcia questioned plaintiff about whether he was trying to start trouble. (Tr. I, p. 77).

According to procedure, housing assignments, such as the one at issue, made after the Placement Office's normal business hours, are to be reviewed the next day by the Placement Office to ensure that cellmates are compatible in terms of security and safety concerns. (Tr. I, pp. 37-41;

Tr. III. P. 71). There is no further evidence on this point. In addition, an institutional directive provides that the segregation lieutenant will conduct a review of double celling arrangements to be forwarded to the chief of security, taking into consideration predatory, aggressive or assaultive behavior, emotional instability or medical concerns, documented enemies, gang affiliation, classification status, physical size, etcetera. (Tr. I, pp. 35-36). Because the Placement Office was closed at the time the decision to cell plaintiff and Garcia together was made, defendant Rausch would have had to have done the best evaluation of their compatibility possible under the circumstances. (Tr. I, p. 36). There is no documentary evidence on what suitability review was done relative to plaintiff and Garcia. (Tr. III, p. 78). Lt. Rausch acknowledged that prison policy is that a prisoner in segregation who states that he does not want to be celled with another is not housed with that inmate. (Tr. III, pp. 69-70). However, Rausch also acknowledged that at the time segregation was full, and if a segregation inmate celled in receiving refused housing and had to be placed back in segregation, things became a bit more complicated because inmates would have to be shuffled around between segregation and receiving. (Tr. III, pp. 74-77). Rausch hypothesizes that if one inmate said he had a problem with another, he, Rausch would ask each if there was such a problem – but he would ask them separately if one inmate had indicated he feared for his life. (Tr. III, pp. 79-80).

When asked why he had not instantly refused to be celled with Garcia, similarly to how he had refused housing just a few days earlier, plaintiff explained that, first, Lt. Rausch had put him on the "hot seat" in front of Garcia; second, Rausch told him that nothing could be

done about his "bad feelings" about Garcia; and third, Rausch, misinformed him that he could not refuse housing, that there was no space to move him. (Tr. II, pp. 30-31). Plaintiff further elaborated that Garcia was much bigger and he feared exacerbating the situation. (Tr. I, p. 76).

The morning after Garcia was celled with plaintiff, May 29th, plaintiff claims to have written two grievances, one regarding his stolen property, the other about health care. (Tr. I, p. 79). Plaintiff had hoped that a psychologist or psychiatrist would ask to see him, giving him an opportunity to speak away from Garcia. (Tr. I, pp. 79-80). Later in the day, motivated by Garcia's promise to get the "hit" off of him and to ensure the return of some of his stolen property, plaintiff agreed to send money to Garcia's parents with instructions that the money be sent back to Garcia in prison – a sort of money laundering scheme designed to evade prison rules against prisoners exchanging money. (Tr. I, p. 77). Again, plaintiff hoped to somehow attract the attention of prison officials so that he could express his concerns about Garcia (Tr. I, pp. 77-80; Plaintiff's Exhibit 8). Eventually, the money transfer did attract the attention of prison officials, but not until after plaintiff was attacked by Garcia.

The next afternoon, May 30th, Garcia suggested that plaintiff needed a haircut, and that he was the man for the job. (Tr. I, p. 80; Tr. III, p. 48). Plaintiff agreed to allow Garcia to trim his hair with a razor, which turned into a hatchet job of sorts. (Tr. I, p. 80; Plaintiff's Exhibit 16). While plaintiff was getting his head shaved, Correctional Officer Watson happened by, at which time Garcia asked plaintiff to finish his own haircut. (Tr. I, p. 81; Tr. III; p. 48). Officer Watson saw plaintiff shaving his own head,

with Garcia offering direction. (Tr. III, p. 48). According to plaintiff, Officer Watson, seeing the bloody nicks on plaintiff's head, suggested that plaintiff might want to go to the Health Care Unit, at which point Garcia took over the conversation, interjecting that plaintiff did not need to leave. (Tr. I, P. 82; Plaintiffs Exhibit 16). Plaintiff mouthed "Help me," but Officer Watson apparently missed this silent plea for help. (Tr. I, P. 82). After the correctional officer left, Garcia slapped and punch plaintiff on the head. (Tr. I, p. 82).

Plaintiff acknowledged that he had multiple opportunities to speak with correctional officers, such as when officers made periodic rounds throughout the day and night, when meals were served, when his grievances and mail were collected, and the like. (Tr. I, pp. 78-82; Tr. II, pp. 35-37). But, plaintiff felt trapped and scared, and he did not know what to do to extricate himself from the situation. (Tr. II, pp. 36-37). He perceived that two of the officers he had direct contact with would not aid him because he had had previous issues with them. Plaintiff generally explained:

> I accepted the fact that I'm in jail and this ain't the Holiday Inn and I know that and this ain't the Burger King, so I know if I have a qualm with somebody, that I've got to deal with that and it's my problem and that's it. Because there was things – because I felt this way that this person may – I didn't know, he didn't do nothing at the time, and I was told that I couldn't refuse housing, . . .

(Tr. II, p. 37).

On the night of May 30th, Garcia indicated that he wanted to have anal sex with plaintiff, despite plaintiff

indicating he did not want this to happen – Garcia ejaculated on plaintiff's feet instead. (Tr. I, pp. 83-84). Later that same night, Garcia forced plaintiff to perform oral sex on him for what plaintiff estimated to be 15 minutes – when Correctional Officer Watson appeared again, asking if they wanted some ice. (Tr. I, p. 84; Tr. III, p. 43). At that instant, plaintiff exited the cell, crouched in a nearby corner, in a fetal position, crying. (Tr. I, p. 84; Tr. III, pp. 43-44). When plaintiff told Officer Watson that Garcia had forced him to shave his bead, beat him, and then forced him to perform oral sex, Watson informed other prison officials and moved plaintiff to the Health Care Unit. (Tr. III, pp. 43-44).

Medical Progress Notes for May 30, 1997, indicate that plaintiff reported that Garcia had forced him to perform oral sex, and that Garcia had ejaculated in his mouth; the head shaving, slapping and punching were also reported. (Plaintiff's Exhibit 23 (5/30/97 10:40 p.m. entry)). However, forensic tests were negative. (Plaintiff's Exhibit 11). Nevertheless, an Illinois Department of Corrections Internal Affairs investigation report indicates that Garcia subsequently admitted to shaving plaintiff's head. (Plaintiff's Exhibit 11). The investigation further found that plaintiff had been intimidated by Garcia into transferring funds, against prison regulations. (Plaintiff's Exhibit 11). Ultimately, the report concluded:

> Based on incident reports, voluntary statements, physical injuries, and polygraph exam results, Internal Affairs substantiates that Inmate Riccardo K50995 was intimidated into performing oral sex on Inmate Garcia N34024 on May 30, 1997.

(Plaintiff's Exhibit 11).

The nurse who initially saw plaintiff testified that plaintiff was severely distressed. (Tr. I, p. 54). Plaintiff was placed on a suicide watch from the night of May 30th until the morning of June 2nd when he was discharged from the Health Care Unit. (Plaintiff's Exhibits 19-21; Plaintiff's Exhibit 23 (6/2/97 entry)). Plaintiff reported stress, feelings of vulnerability, difficulties sleeping and flash backs to health care officials, who noted that Post Traumatic Stress Disorder (PTSD) was possible. (*See* Plaintiff's Exhibit 23 (6/4/97-6/24/97 entries)). Plaintiff was transferred from Centralia Correctional Center to Sheridan Correctional Center, where it was determined that he was not to be celled with another inmate. (Plaintiff's Exhibit 23 (6/24/97-9/12/97 entries)). Medical Progress Notes through June 28, 2000, reflect persistent complaints anxiety and apprehension, trouble sleeping, and the like. (*See* Plaintiff's Exhibit 23).

In June 1997, Dr. Isaac Suh, a prison psychiatrist, diagnosed plaintiff as having an adjustment disorder; PTSD was a diagnosis yet to be ruled out. ((Plaintiff's Exhibit 22 (6/19/97) entry)). This tentative diagnosis persisted until October 1999 when psychologist Sherry Kalicak concluded that plaintiff did suffer from PTSD. (*See* Plaintiff's Exhibit 22 (10/25/99 entry)). In contrast, psychologist Daniel Kozubal concluded around that same time that plaintiff suffered from a possible narcissistic personality disorder. (*See* Plaintiff's Exhibit 22 (11/18/99 entry)). Social worker Blomquist subsequently adopted the narcissistic diagnosis, too. (*See* Plaintiff's Exhibit 22 (4/5/00 entry)). In March 2001, Dr. Kalicak revised her diagnosis, finding that plaintiff's adjustment disorder was in full remission and medication could be discontinued. (Tr. II, p. 23). Nevertheless, Blomquist testified at trial that, to this

day, he still has not ruled out PTSD, and that symptoms persist. (Tr. II, p. 25). However, overall, Blomquist reported that having met with plaintiff almost 28 times, plaintiff seems future oriented and relatively sociable. (Tr. III, pp. 4-5, 14 and 30-31).

Dr. Kozubal, the clinical psychologist at Sheridan Correctional Center who saw plaintiff on two occasions, testified at trial and characterized plaintiff as having "a bit of an adjustment disorder with some anxiety" – "one of the most common diagnoses within our prison situation, given the nature of life in an institution having to do with the stress of living closely with other people, not in a place of one's choice." (Tr. II, pp. 170 and 173). However, upon learning that the sexual assault had been substantiated by Internal Affairs, Dr. Kozubal acknowledged that PTSD was a viable diagnosis, and that testing and being able to review all of plaintiff's medical records would be of great assistance in rendering a diagnosis. (Tr. II, pp. 175-184, and 188-189; Tr. III, p. 35).

In contrast, plaintiff's retained psychologist, Dr. Tony Fletcher, testified that after evaluating plaintiff for approximately four hours, reviewing medical records, and conducting a battery of tests, he concluded, to a reasonable degree of medical certainty, that plaintiff did suffer from PTSD. (Tr. II, pp. 54-55, 79-80, 83, and 109). Furthermore, Dr. Fletcher noted that the validity indicators in the tests administered to plaintiff were consistent, showing no signs of minimization or exaggeration of plaintiff's psychological difficulties, or malingering. (Tr. II, pp. 73, and 80-82). The trouble sleeping, outbursts of anger, panic attacks, depression, anxiety, hyper-vigilance, emasculation, and identity confusion that plaintiff complains of are consistent with a prominent anxiety disorder. (*See* Tr. II, pp. 75-80 and 91).

Dr. Fletcher explained that plaintiff's alleged inability to take advantage of those situations where he could have sought the help of corrections officials – his paralysis – was typical of a stress disorder. (Tr. II, pp. 67-70, 106, and 117-118). With regard to the Garcia incident being the second time plaintiff was sexually assaulted, Dr. Fletcher felt that the second incident was the "straw that broke the camel's back." (Tr. II, p. 100). Predicting plaintiff's long term prognosis, Dr. Fletcher noted that 13% continue to exhibit PTSD symptoms after 15 years, but that PTSD can get better, or worse, and may remit. (Tr. II, pp. 104).

The jury found in favor of plaintiff and awarded plaintiff $1.5 million. (Tr. III, p. 127).

Analysis

1. Deliberate Indifference

> Having incarcerated persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objectiv[e], any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.

Farmer v. Brennan, 511 U.S. 825, 833 (1994).

In accordance with the aforestated rationale, the Supreme Court has found that in situations such as the one at bar, involving a threat of inmate-on-inmate violence, a prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment's prohibition against "cruel and unusual punishment. *Id.; see also Little v. Walker*, 552 F.2d 193 (7th Cir. 1977).

Under the "deliberate indifference" standard, a prison official may be held liable under the Eighth Amendment only if he knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it; "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 847. A plaintiff must satisfy both the objective (substantial risk of serious harm) and the subjective (knowing disregard) components of the test. *Farmer*, 511 U.S. at 834. This standard is the equivalent of recklessness in the criminal law sense. *Id.* At 837.

> [A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. . . . Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Id., 511 U.S. at 842 (internal citations omitted).

> That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.
>
> In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety."

Id, at 844.

According to plaintiff, when defendant Rausch arrived with plaintiff's new cellmate, inmate Garcia, he told defendant that he "fear[ed] for his life" because the Latin Kings had a "hit" on him, that Garcia was a Latin King, and that Lt. Alemond had agreed earlier that plaintiff would not be celled with Garcia. (Tr. I, pp. 73-75). At that point in time, based solely on what plaintiff told him, from an objective perspective, there was a substantial risk of serious harm to plaintiff if he and Garcia were celled together. Knowingly housing inmates who are enemies together is plainly dangerous, and a guard who is alerted to such a risk should tread cautiously. However, defendant would also factor-in that, when plaintiff and Garcia were jointly asked whether there was a problem, plaintiff indicated that he did not have a problem with Garcia (Tr. I, p. 75) – leaving defendant to guess which was true.

Rausch himself, hypothetically, conceded the unreasonableness of questioning the inmates together about the nature of "the problem." (Tr. III, pp. 79-80). The jury must have accepted plaintiff's explanation that when asked if he had a problem with Garcia, feeling like he was "on the hot seat," he did not have a choice, so he shook his head in the negative. (Tr. I, p. 75). Consequently, the jury must have discounted plaintiff's "statement" that he did not have a problem with Garcia. Given that plaintiff had just moments before alerted defendant Rausch that Garcia was a threat, and that Rausch had indicated that plaintiff either could not refuse Garcia as a cellmate, or that segregation was full and there were no alternate cells available (*see* Tr. III, pp. 74-77), the jury may have perceived that Rausch's inquiring whether the inmates had a problem with each other as more akin to a statement, rather than a question. Regardless of what Rausch concluded, taking the totality of the circumstances and the information conveyed to Rausch, this Court finds that, from an objective perspective, at the time Rausch made the decision to cell Garcia with plaintiff, there was a substantial risk of serious harm to plaintiff. *See Farmer*, 511 U.S. at 844. The scenario defendant Rausch faced has "DANGER – PROCEED WITH CAUTION" written all over it.

Rausch inferred from the fact that he ultimately celled plaintiff and Garcia together that he must not have perceived a serious threat; in addition, Rausch stresses that he made an effort to assess the seriousness of the situation, and plaintiff communicated that he did not have a problem with Garcia. Nevertheless, the jury *may* infer that Rausch knew of the substantial risk from the very fact that the risk was obvious – which the jury apparently

did. *Farmer*, 511 U.S. at 842 and 844. Rausch need not have specifically desired that harm befall plaintiff. *Farmer*, 511 U.S. at 842.

Mere obviousness is not conclusive; if it were, the subjective recklessness aspect of deliberate indifference would lose all meaning. However, in this case, there is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was merely pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. *Farmer*, 511 U.S. at 839-840. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of "asking" each inmate if he had a problem with the other. Credibility had to have been key to the jury's analysis, this Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it very well may have reached the same conclusion as the jury.

Defendant Rausch highlights that he did *something* – he brought the inmates together and asked them if they had a problem with each other. However, a prison official will only be freed from liability if he responded *reasonably* to the risk. *Farmer*, 511 U.S. at 844. As mentioned above, Rausch's method of questioning could be perceived as deliberately forcing plaintiff to make a Hobson's choice. This Court does not perceive how deliberately forcing plaintiff to make a true Hobson's choice can be deemed a reasonable response, particularly if plaintiff's testimony that Rausch told him he could not be moved to a different

cell is believed. Again, credibility is the linchpin of liability.

2. Causation

It is undisputed that during the 48 hour period between May 28th when defendant Rausch celled plaintiff and Garcia together, and when plaintiff was sexually assaulted by Garcia on May 30th, plaintiff had contact with multiple prison officials, all of whom could have offered plaintiff sanctuary. It is also undisputed that the Placement Office has the final say in cell assignments, and that it is standard operating procedure for the Placement Office to review all after-hour cell assignments the next day. Defendant argues that plaintiff's failure to ask others readily available for sanctuary, and the Placement Office's allowing plaintiff and Garcia to remain celled together break the causal chain and relieve him of any liability.

With regard to plaintiff's failure to seek sanctuary, he explains that he believed Lt. Rausch's assertion that he could not be moved, that there were no other housing options. In contrast, defendant notes that plaintiff was aware of his right to refuse housing at any time because that was how he had ended up in the cell he was in. However, plaintiff implies that having refused housing so that he was in a protective assignment, he could not refuse another assignment.

Insofar as the Placement Office was to review all after-hours cell assignments, plaintiff notes that there was no evidence that such a review ever occurred, implying that there was insufficient evidence to establish a break in the causal chain.

"'A section 1983 action is a tort damage action even though the duty the defendant is alleged to have breached is created by the Constitution or federal law.' As a common law tort action, the plaintiff in a civil rights tort action bears the burden of establishing that the defendant owed the plaintiff a duty, that the defendant breached his duties to the plaintiff, and that this breach caused the plaintiff actual damages.'" *Muckway v. Craft*, 789 F.2d 517, 521 (7th Cir. 1986) (quoting *Garza v. Henderson*, 779 F.2d 390, 395 (7th Cir. 1985)). "The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of [his] constitutional rights." *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988) (citations omitted). The causal chain may be broken, but "[t]he intervention of independent, concurrent or intervening forces will not break the causal connection if the intervention of each independent force was itself probable and foreseeable." *Hylin v. U.S.*, 715 F.2d 1206, 1216 (7th Cir. 1983).

Causation and intervening causation are questions of fact, and as such may rise and fall on credibility determinations. In this situation, if the jury believed that it was reasonable for plaintiff to have believed defendant Rausch when he indicated plaintiff could not refuse a cell assignment in the situation he was in, or that there was no other option because of a shortage of open cells, then it would follow that plaintiff did not see that he had any other options to seek sanctuary. In that plaintiff had asked correctional lieutenant – Rausch – for help, and having not been helped, it is neither unreasonable, nor unforeseeable to conclude that no help is available.

The fact that the Placement Office should have or could have reassigned Garcia does not break the causal chain. As plaintiff correctly notes, there was no evidence that the Placement Officer ever reviewed Garcia's cell assignment. There is also no evidence that plaintiff's specific fear of Garcia was ever relayed to the Placement Office. Furthermore, a prison policy that the Placement Office should review all after-hours cell assignments does not create an intervening constitutional obligation that would break the causal chain.

3. Qualified Immunity

Qualified immunity generally shields government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737 (7th Cir. 1994). The plaintiff bears the burden of establishing the existence of a clearly established constitutional right in relation to the specific facts confronting the public official when he acted. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988). Thus, an official is personally liable for his or her unlawful actions if, "assessed in light of the legal rules that were clearly established at the time it was taken," those actions were legally and objectively unreasonable. *May v. Sheahan*, 226 F.3d 876, 881 (7th Cir. 2000) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

Defendant Rausch argues that he took some action, thereby satisfying his obligations under *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Duane v. Lane*, 959 F.2d 673 (7th Cir. 1992). However, as fully explained above,

defendant is legally incorrect. "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded *reasonably* to the risk, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at 844. If the action taken was unreasonable, as it appears to be in this case, then the official may be found liable.

4. The Award

The jury awarded plaintiff $1.5 million, which defendant argues is grossly, even monstrously, excessive, "given the lack of evidence of causation, the contradicted nature of the emotional injury and awards in similar cases." The defendant cites numerous prisoner sexual assault cases and smattering of non-prisoner sexual assault cases, all of which involved awards more than $1 million less than what plaintiff was awarded. In contrast, plaintiff cites a passel non-prisoner sexual assault cases where the awards were millions of dollars more than what plaintiff received.

A jury award of damages may be set aside only if it is grossly excessive. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424 (7th Cir. 1986). "There is no precise or exact measuring stick for calculating general damages for pain and suffering. Although the jury should not pick a figure out of the air, exact compensation for pain and suffering is impossible." *Butler v. Dowd*, 979 F.2d 661, 671 (7th Cir. 1992). In evaluating whether an award is grossly excessive, a detailed appraisal of the evidence bearing on damages is essential. *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156, 159 (1968). However, insofar as the award hinges upon credibility determinations about the evidence, the jury's conclusions are viewed deferentially,

as the jury had the benefit of hearing the testimony, observing the demeanor of the witnesses, and it reflects community standards. *See Butler*, 979 F.2d at 671.

Aside from plaintiff's own testimony about the traumatizing and debilitating effects of Garcia's attack, the jury received evidence from several mental health professions connected with the Illinois Department of Corrections. Two psychologists, Drs. Suh and Kalicak, concluded that plaintiff suffered from an adjustment disorder; Dr. Kalicak specifically diagnosed Post Traumatic Stress Disorder, which was deemed in remission as of March 2001. Dr. Kozubal found that plaintiff suffered from a narcissistic personality disorder, but upon learning that plaintiff had been sexually assaulted before, Dr. Kozubal left open the possibility of PTSD. (Vol. II, pp. 188-189). Prison social worker Blomquist agreed that plaintiff was narcissistic, but he could not rule out PTSD, as symptoms currently persisted. Plaintiff's retained psychologist, Dr. Fletcher, testified that, after a battery of tests, he concluded that, with a reasonable degree of medical certainty, plaintiff suffers from PTSD, which may improve with time and treatment. Dr. Fletcher further opined that he considered the second sexual assault by Garcia to be the tipping point for plaintiff's mental health.

A tortfeasor must take his plaintiff as he finds him, although he cannot be held liable for the aggravation of a pre-existing condition if there is no causal link. *See generally Reed v. Union Pacific R. Co.*, 185 F.3d 712, 717 (7th Cir. 1999). Dr. Fletcher's opinion that the second sexual assault was what caused plaintiff's fragile mental state to break supports what could have been inferred from plaintiff's own testimony and the chronology of events.

The wide range of awards cited by the parties illustrate how fact-specific such awards are. Insofar as the $1.5 million award falls more in line with awards in non-prisoner sexual assault cases, this Court must stress that prisoners have the same worth and are equal in the eyes of the law to non-prisoners. *See generally Kerr v. City of Chicago*, 424 F.2d 1134, 1138 (7th Cir. 1970). In this case, the $1.5 million award is within the realm of awards in other sexual assault cases. Again, because such awards are so fact-specific, and a reflection of credibility determinations, this Court is loathe to deem this award grossly excessive. Plaintiff's fragile status before being attacked by Garcia, and the particular facts provide a reasonable basis for why this award is higher than some others. Similarly, the award may have reasonably been even higher, except for testimony indicating that plaintiff's functioning had improved. The Court does not perceive that it is a denial of justice to let the award stand.

IT IS THEREFORE ORDERED that, for the aforestated reasons, defendant Rausch's motion seeking judgment as a matter of law and/or a new trial (Doc. 56) is DENIED in all respects; judgment in favor of plaintiff Riccardo and the award of $1.5 million shall stand.

IT IS SO ORDERED.

DATED: March 7, 2002

/s/ Clifford J. Proud
CLIFFORD J. PROUD
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Anthony Riccardo,	)	
	)	
Plaintiff,	)	**NO. 99-372-CJP**
-vs-	)	
Lieutenant Larry Rausch,	)	
	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

(Filed Apr. 12, 2001)

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff **ANTHONY RICCARDO** and against defendant **LIEUTENANT LARRY RAUSCH** in the amount of one million five hundred thousand dollars ($1,500,000.00) in accordance with jury verdict filed April 11, 2000.

DATED this 11th day of April, 2001.

NORBERT G. JAWORSKI, CLERK

BY: /s/ [Illegible]
Deputy Clerk

Approved by Clifford J. Proud
United States Magistrate Judge
Clifford J. Proud

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTHONY RICCARDO,	)	
	)	
Plaintiff,	)	**CIVIL NO. 99-372-GPM**
vs.	)	
LARRY RAUSCH, Lieutenant,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

(Filed Mar. 27, 2000)

MURPHY, District Judge:

This matter is before the Court on the Report and Recommendation of Magistrate Judge Proud dated January 20, 2000 (Doc. 22), which recommends that Defendant's motion to dismiss (Doc. 7) be denied. Defendant received the Report and Recommendation on January 31, 2000, and filed an objection thereto on February 10, 2000 (Doc. 23).

Timely objections to the Report and Recommendation having been filed, the Court has undertaken a *de novo* review of the entire record in this case as required by 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72(b), and Southern District of Illinois Local Rule 73.1(b). In undertaking this *de novo* review, the Court has looked at all of the evidence contained in the record and has given "fresh consideration to those issues to which specific objection has been made by a party." H.R.REP.NO. 94-1609, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6163 (defining "*de novo* determination" for purposes of

28 U.S.C. § 636(b)(1)); *see also United States v. Raddatz*, 447 U.S. 667, 675-76 (1980) (district court must make *de novo* determination regarding those parts of magistrate judge's report to which any party objects, but *de novo* hearing is not required).

Having undertaken a *de novo* review of the entire record in this case, the Court agrees with the Report and Recommendation that Defendant's motion to dismiss this action by reason of Plaintiff's alleged failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a) should be denied. The record shows that the incident giving rise to this action occurred on May 30, 1997, when Plaintiff was assaulted while incarcerated at Centralia Correctional Center. Plaintiff filed a grievance in connection with this incident on February 11, 1998, while incarcerated at Sheridan Correctional Center. Plaintiff's grievance was untimely because not filed within six months after the incident giving rise thereto. *See* 20 ILL. ADMIN. CODE § 504.810(a). However, Plaintiff's grievance was not denied as untimely by the grievance officer, who instead sent the grievance to the Administrative Review Board (ARB) on February 23, 1998 (*see* Doc. 18, Ex. 2). On March 5, 1998, Plaintiff appealed the Chief Administrative Officer's decision on his grievance to the Director of the Illinois Department of Corrections (IDOC) via the ARB (*see* Doc. 18, Ex. 2). Thereafter, it is unclear what action, if any, the IDOC took on Plaintiff's grievance. On May 27, 1999, Plaintiff filed the instant action pursuant to 42 U.S.C. § 1983, alleging in connection with the assault at Centralia Correctional Center that Defendant, a corrections officer at Centralia, failed to protect him from serious physical harm in violation of the Eighth Amendment.

It is the Court's view that Plaintiff sought to pursue administrative remedies, but the IDOC simply "dropped the ball" in processing his grievance. While it may be that, as Defendant states in his objection, the ARB would have denied Plaintiff's grievance as untimely, it appears that the ARB took no action of any kind on the grievance. The Court sees no reason why this procedural default should be laid to Plaintiff's account. Accordingly, the Court hereby **ADOPTS** the Report and Recommendation (Doc. 22), so that Defendant's motion to dismiss (Doc. 7) is **DENIED**.

IT IS SO ORDERED.

DATED: **03/27/00**

/s/ [Illegible]
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTHONY RICCARDO,	)	
Plaintiff,	)	
	)	**Civil No.**
v.	)	**99-372-GPM**
LIEUTENANT LARRY RAUSCH,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

(Filed Jan. 20, 2000)

PROUD, Magistrate Judge:

This matter was recommitted to the undersigned for a determination as to whether plaintiff was a prisoner when this action commenced and, if so, whether plaintiff exhausted his administrative remedies as required by 42 U.S.C. 1997e[1]. This Report and Recommendation is respectfully submitted to United States District Judge G. Patrick Murphy pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). Before the Court is defendant's Motion to Dismiss and supporting memorandum and plaintiff's response thereto and Court ordered responses by plaintiff and defendant (Docs. 7, 8, 9, 18, 19).

[1] 42 U.S.C. §1997e(a) is also referenced as Section 803(d) of the PLRA of 1996 (Title VII of Pub.L. 104-134, 110 Stat. 1321 (effective April 26, 1996)).

Procedural History

On May 27, 1999, plaintiff filed the above-captioned civil rights suit, pursuant to 42 U.S.C. § 1983, alleging that while he was incarcerated at Centralia Correctional Center defendant Rausch failed to protect him from serious harm in violation of the Eighth Amendment. (Doc. 1). More specifically, plaintiff claims that, over his objections, Rausch placed plaintiff in a cell with gang member Garcia, who had a hit on plaintiff. Subsequently, Garcia shaved plaintiff's head and sexually assaulted plaintiff. Plaintiff seeks monetary damages. (Doc. 1, p. 3).

Plaintiff was incarcerated at Centralia Correctional Center from November 21, 1996, through June 24, 1997, when he was transferred to Sheridan Correctional Center. On February 11, 1998, plaintiff filed a grievance complaining of the alleged May 30, 1997, assault. The Counselor's Response dated February 23, 1998, is as follows: "Incident occurred in Cook Co. and Centralia CC grievance be sent to ARB." *Doc. 18, Pl.'s Ex. 2.* Plaintiff appealed to the Administrative Review Board on March 5, 1998. *Doc. 18, Pl.'s Ex. 2.* Plaintiff was paroled on March 16, 1998. Plaintiff was then held at Cook County Jail from April 17, 1998, to October 8, 1999. He filed the present complaint while being held at Cook County Jail.

Analysis

It is now clear that at the time the complaint was filed plaintiff was a prisoner confined in a jail. "Prisoner" is defined as any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial

release, or diversionary program. 42 U.S.C. §1997e(h). Pursuant to 42 U.S.C. §1997e(a), "No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Exhaustion of administrative remedies is required before a case may be brought, even if exhaustion is accomplished during pendency of the case. *See* 42 U.S.C. § 1997e(a); and *Perez*, 182 F.3d at 534-37. Exhaustion of administrative remedies pursuant to 42 U.S.C. § 1997e(a), while not jurisdictional per se, is a "precondition" to suit, regardless of the apparent futility of pursuing an administrative remedy, regardless of whether money damages are sought as a tangential remedy and regardless of notions of judicial economy. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999). Defendant moves to dismiss this cause on the basis that plaintiff failed to exhaust his administrative remedies. Defendant provides to the Court an affidavit stating that a search of the Administrative Review Board's records for plaintiff indicate that plaintiff did not file a grievance. However, plaintiff provided to the Court a grievance which indicates that plaintiff initiated administrative remedies. Plaintiff further responds that the exhaustion requirement is inapplicable because the sexual assault complained of is already complete and no remedies are available through the administrative process.

The Illinois Department of Corrections (IDOC) has adopted a grievance procedure for inmates whereby an inmate first takes his complaint to a correctional counselor, if this does not resolve the problem, he is to file a written grievance on an institutional form within six

months of the incident or occurrence complained of. If a committed person can demonstrate that a grievance was not timely filed for good cause, the grievance shall be considered. Each institution has one or more designated grievance officers who review such grievances. The grievance officer reports his or her findings and recommendations to the chief administrative officer, i.e., the warden, within fifteen days, "whenever possible," and the warden is to advise the inmate of his or her decision within ten days after receipt of the grievance officer's report. In an emergency, an inmate may send his grievance directly to the warden. If the warden determines that there is a substantial risk of imminent personal injury to the inmate, the grievance is to be decided within three days.

The inmate may appeal the warden's disposition of the grievance in writing to the director of the Department of Corrections within 30 days of the warden's decision. The director reviews the grievance and the responses of the grievance officer and warden, and determines whether the grievance requires a hearing before the Administrative Review Board. If it is determined that the grievance is meritless or can be resolved without a hearing, the inmate is to be advised of this disposition within 30 working days of receipt of the grievance. Otherwise, the grievance is referred to the Administrative Review Board, which may hold hearings and examine witnesses. The Board is supposed to submit a written report of its findings and recommendations to the director of the Department of Corrections within 30 working days of receipt of the grievance, "whenever possible"; presumably within 30 working days of the Board's receipt of the grievance, not the director's. The director then has ten days to make a final determination, again "whenever possible." 20 Ill.Adm.Code § 504.810-850 (1992).

Plaintiff did not timely file his grievance. However, the grievance officer did not reject the grievance as untimely but indicated that the grievance was to be sent to the Administrative Review Board. The grievance form indicates that on March 5, 1998, plaintiff appealed the decision to the Director, following the appropriate grievance process. The Court was not provided with a response form the Director, however, the Court notes that the time for a response and final determination from the director has long passed. Based on the information before the Court plaintiff has availed himself of the administrative remedies available and has exhausted same.

The Court further notes that both plaintiff and defendant provided to the Court information regarding administrative remedies available to the plaintiff while he was held at Cook County Jail. The Court will not consider those options since plaintiff provided to the Court evidence of exhaustion while in state prison custody.

Recommendation

IT IS THEREFORE RECOMMENDED, based on the foregoing analysis, that defendant's Motion to Dismiss (Doc. 7) be DENIED.

SUBMITTED this 20th day of January, 2000.

/s/ Clifford J. Proud
CLIFFORD J. PROUD
UNITED STATES MAGISTRATE JUDGE